Supreme Court, U.S.
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No. 09-723

IN THE

Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, *et al.*,

Petitioners,

—v.—

THE REPUBLIC OF ARGENTINA,

ARAUCA BIT AFJP S.A., *et al.*,

ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2001, the Republic of Argentina (the "Republic") committed the largest sovereign debt default in history. Having waived sovereign immunity to jurisdiction in federal court in New York, several billion dollars in final money judgments have been entered against the Republic in the United States on the basis of its defaulted debt. The Republic has refused to honor those judgments. Petitioners and other judgment creditors of the Republic are therefore relegated to the judgment enforcement procedures afforded to them under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, and applicable state judgment enforcement law, in seeking to enforce their judgments against a government that the District Court has repeatedly observed is doing everything it possibly can to render itself judgment-proof in the United States.

In December 2008, the Republic nationalized the country's private pension fund system and expropriated and consolidated several billion dollars worth of formerly privately-owned and managed pension fund savings under the exclusive and unfettered control of the executive branch of the Argentine government. Some unknown quantity (but at least several hundred million dollars) of these nationalized assets was held in investment accounts in the United States. Under the terms of the Argentine legislation expropriating the assets, the Republic stipulated that the assets would be acquired by the government "*in kind*" and as a matter of law in the same investment accounts in which they were already invested.

Petitioners sought permission from the District Court for the Southern District of New York to

execute their judgments on assets invested through accounts held in New York that were subject to the nationalization. Initially, and pending determination that the assets were excepted from foreign sovereign immunity under the FSIA as a result of their nationalization, Petitioners sought and obtained narrow restraining orders to prevent removal from the United States of the assets held in investment accounts in New York so that the District Court could maintain jurisdiction long enough to decide if Petitioners were entitled to execute their judgments on the assets. Petitioners were able to freeze approximately $200 million held in investment accounts in New York that were then acquired "in kind" by the Republic when the nationalization legislation took effect in early December 2008. Subsequent investigation revealed that hundreds of millions of dollars more in nationalized assets were also located in the United States but immediately had been spirited out of the country before Petitioners could identify the financial institutions where those additional assets were located and serve restraining orders that would have prevented their removal from the jurisdiction of the U.S. courts.

In a decision rendered on an expedited basis, the District Court determined that the investment accounts that Petitioners were able to prevent from flight became property of the Republic as a result of their nationalization and therefore became subject to attachment and execution under Section 1610(a) of the FSIA, which excepts from sovereign immunity "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States." App. 87a (28 U.S.C. § 1610(a)). Following an expedited appeal to the Second Circuit Court of

Appeals, a two-judge panel of the Court disagreed, reversing and vacating the decision of the District Court. According to the Second Circuit, the nationalized investment accounts were never "used for a commercial activity in the United States" by the Republic because they were restrained from being removed from the jurisdiction at the time the Republic nationalized and acquired ownership of them "in kind" from private investors, even though the Republic specifically adopted the same investment "use" of the assets under the nationalization legislation as the private investors that previously held the accounts.

The question presented is therefore:

Whether the Second Circuit Court of Appeals, with responsibility for one of the world's leading financial markets and hundreds of pending lawsuits against the Republic of Argentina: (i) erred under the plain language of the FSIA and this Court's holding in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-17 (1992), when it held, as a matter of first impression, that a foreign state's nationalization and adoption "in kind" of property "used" for investment activity in the United States, through accounts maintained at third-party financial institutions acting on the foreign state's behalf, does not constitute "use" by the foreign state of its property "for a commercial activity in the United States", as would come within the exception to foreign sovereign immunity under Section 1610(a) of the FSIA, and (ii) whether the Court of Appeals compounded that error by holding that a narrowly-tailored restraining order, which prevented only the removal from the United States of investments held, and freely tradable, by the foreign state pending the

District Court's determination of whether those investments were excepted from sovereign immunity, *ipso facto* prevented the foreign state from "using" the accounts for a commercial activity in the United States, thereby placing judgment creditors of a foreign state in a procedural catch-22 under the FSIA because, absent a narrowly-tailored order to maintain federal jurisdiction to determine if specific property of a foreign state is excepted from immunity under 28 U.S.C. § 1610, a foreign state is free simply to remove the assets from the United States the moment a creditor applies to a federal court for a determination of that threshold question, so as to deprive the court of jurisdiction ever to decide whether the assets are excepted from immunity.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this case are Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC.

Petitioners are joined in this application by individual bond holders Allan Applestein, Allan Applestein TTEE FBO D.C.A. Grantor Trust, Giovanni Carlotta, Raimondo Iallonardo, Valerio Piacenza, Milena Ampalla, Antonella Bacchiocchi, Giancarlo Bartolomei Corsi, Anneliese Gunda Becker, Giorgio Bennati, Giorgio Bennati, Carla Morata, Orsolina Berra, Giorgio Bistagnino, Eugenia Re, Stefano Bistagnino, Felicina Gaioli, Andrea Bonazzi, Masina Mirco, Luca Vitali, Stefania Bonpensiere, Bruno Calmasini, Tarcisia Dalbosco, Italia Camato, Vincenzo Carbone, Marco Cavalli, Valeria Toso, Carmelina Censi, Gian Francesco Cercato, Barbara Ricchi, Silvana Corato, Giulia Greggio, Francesco Corso, Giuseppina Corso, Laura Cosci, Aldo David, Antonio De Francesco, Francesco Foggiato, Rinaldo Frisinghelli, Graziella DaCroce, Angiolino Fusato, Fusato Gabriele, Anna Storchi, Felicina and Maddalena Gaioli, Francesco Mauro Ghezzi, Maria Luigia Conti, Gianfranco Guarini, Innovamedica S.p.A. (f/k/a MATIVA S.r.l.), Angelo Leoni, Rachele Bontempi, Carmelo Maio, Romano Marton, Mirco Masina, Andrea Bonazzi, Guglielmina Massara, Martino Verna, Alessandro Morata, Maria Rita Moretto, Ugo Lorenzi, Bruno Pappacoda, Luisella Guardincerri, Adriano Rosato, Sante Stefani, Angelina Salmistraro, Studio Legale Bennati, Renate Tielman, Manuelito Toso, Mauro Toso, Mario Vicini, Giuseppina Capezzera, Graziella Bonadiman, Italia Camato, Salvatore Melchionda, Tiziano Sasselli, Giovanna Ferro, Renata Boscariol, Giampaolo Montino,

Maurizio Sergi, Simona Staccioli, Augusto Arcangeli De Felicis, Alberto Compare, Adriana Dell'Era, Gian Carlo Ganapini, Laura Anna Capurro, Fernanda Angela Lovero, Sabrina Parodi, Paola Rosa, Licia Stampfli-Rosa, Agostino Consolini, Cesarino Consolini, Agostino Consolini, Mario Giacometti, Verna Gualandi, Hilda Rupprecht, Carlo Farioli, Gianfranco Agostini, Roberto Berardocco, Carlo Bretti, Susanna and Maria Robiati, Anna Ferri, Giovanni Giardina, Vincenza Sabatelli, Franco Pezze, Angelo Cottoni, Bruna Mattioli, Allessandra Regoli, Silvia Regoli, Ines Rota, Vito Zancaner, Matteo and Giovanni Zanichelli, Massimo Bettoni, Carla Marini Arcangeli De Felicis, Carifin S.A., Eufrosina Castagna, Diego and De Stefano, Graziano Adami, Monica Crozzoletto, Celestino Goglia, Paolo Lisi, Elide Margnelli, Amato Mori, Ruggero Rossini, Antonietta Giuseppina Brioschi, Raffaele Rossini, Simonetta Montanari, Claudio Mori, Alfredo Pelli, Graziella Berchi, Giuseppe Silvio Rossini, Marinella Scalvi, Laura Rossini, Adriano Bettinelli, Ruggero Rossini, Antonietta Giuseppina Brisochi, Sergio Lovati, Alberto Baciucco, Otello Baciucco, Emanuele Botti, Giovanni Botti, Maria Ziliani, Lucibello Piani, Pier Luigi, Franco Trentin, Stefania Trentin, Marco Borgra, Sergio Borgra, Marco Borgra, an Donatella Fragonara Zanotti (collectively, the "Individual Bond Holders").

In addition to Petitioners, other Plaintiffs-Appellees in the consolidated appeals below were GMO Emerging Country Debt L.P., GMO Emerging Country Debt Investment Fund PLC, GMO Emerging Country Debt Fund, Teachers Insurance and Annuity Association of America, Lightwater Corporation Limited, Old Castle Holdings, Ltd., Meridian Investments & Business Corporation, Capital Ventures

International, Andrarex, Ltd., NML Capital Ltd. and EM Ltd.

The Respondents in this case are the Republic of Argentina (Defendant-Appellant below), Arauca Bit AFJP S.A., et al. (Interested Non-Party Appellants below), and Administración Nacional de Seguridad Social (Interested Non-Party Appellant below).

RULE 29.6 DISCLOSURE

Aurelius Capital Partners, LP ("ACP") is a limited partnership organized and existing under the laws of the State of Delaware. It is not a corporation.

Aurelius Capital Master, Ltd. ("ACM") is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital International, Ltd. is the parent of ACM. No public corporation owns 10% or more of ACM.

Blue Angel Capital I LLC ("Blue Angel") is a limited liability company organized and existing under the laws of the State of Delaware. It is not a corporation.

The Individual Bond Holders who join in this Petition are individuals, not corporations, except for Carifin, S.A. and Innovamedica S.p.A. (f/k/a MATIVA S.r.l.), which are corporations not publicly held.

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Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC (collectively the "Aurelius Parties" or "Petitioners"), joined by certain Individual Bond Holders, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. 1a) is reported at 584 F.3d 120 (2d Cir. 2009). The District Court's opinion dated December 11, 2008, as amended on March 12, 2009 (App. 23a), is not officially reported but is available at *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715 (TPG), 2009 WL 755231 (S.D.N.Y. Mar. 12, 2009). The District Court's opinion dated March 4, 2009 (App. 59a) is not officially reported but is available at *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715 (TPG), 2009 WL 577281 (S.D.N.Y. Mar. 4, 2009).

JURISDICTION

The Court of Appeals entered its judgment on October 15, 2009 (App. 1a), and denied a timely petition for rehearing and/or rehearing *en banc* on November 23, 2009 (App. 67a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1330, the Republic being a foreign state not entitled to immunity under 28 U.S.C. §§ 1605-1607 or under any applicable international agreement.

On December 2, 2009, the Court of Appeals stayed the mandate pending this petition for a writ of *certiorari*. App. 74a. On December 4, 2009, the Court of Appeals issued an order staying the mandate pending this petition for a writ of *certiorari* being filed within twenty-one (21) days. App. 70a.

RELEVANT STATUTORY PROVISIONS

Section 1610(a) of the Foreign Sovereign Immunities Act provides, in pertinent part, that "[t]he property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States." 28 U.S.C. § 1610(a).

Section 1603(d) of the Foreign Sovereign Immunities Act provides, in pertinent part, that "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

The complete text of Sections 1610(a) and 1603(d) of the FSIA are set out in the Appendix (App. 86a-88a).

STATEMENT OF THE CASE

This case concerns the exception to foreign sovereign immunity that Congress intended creditors of foreign states to have under the

Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(a), and whether investment accounts in the United States that are *nationalized* by a foreign government, but maintained on that government's behalf by third-party financial institutions in the United States, may be subject to attachment or execution under the FSIA based upon the foreign government's *holding* of the investments in such accounts, just as a private investor might do, without necessarily actively trading them. The case raises issues of national and international importance, not only because of the hundreds of judgment creditors of the Republic of Argentina from around the world that are looking to the federal courts of the United States for assistance in enforcing payment obligations that the Republic assumed here but now refuses to pay, but also because investments held through custodial or other accounts maintained at third-party financial institutions in the United States are a common and quintessential form of commercial activity by which foreign states routinely participate in this country's financial markets. If allowed to stand, the decision below would allow foreign-state judgment debtors to reach into the United States and nationalize and expropriate commercial assets located here, without those assets becoming subject to attachment or execution by a foreign state's U.S. judgment creditors. The decision further creates substantial uncertainty as to the scope of a foreign government's sovereign immunity in connection with a type of commercial investment activity in which foreign states, and private market actors alike, routinely engage, in conflict with this Court's authoritative treatment of the meaning of "commercial activity" in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-17 (1992).

The decision also engenders confusion and sets a poor precedent in relation to the procedures to be followed by judgment creditors that are forced to proceed under the FSIA to try to enforce their lawful judgments against a recalcitrant foreign government which has waived sovereign immunity. The Second Circuit Court of Appeals placed Petitioners in an impossible procedural predicament by holding that a restraining order necessary to preserve the District Court's jurisdiction over the property in question long enough to determine, as the FSIA requires, whether the exception to sovereign immunity applied to the property, effectively conferred immunity on that property by preventing its "commercial use". And yet, had Petitioners not obtained a narrow restraining order to prevent removal of the property from the country while their application for permission under the FSIA to attach or execute against the property was *sub judice*, the property almost surely would have been removed from the country (as hundreds of millions of dollars worth of assets that were not restrained in time were), thus equally preventing the District Court from being able to determine whether Petitioners were entitled to execute their judgments on the property. The decision below leaves judgment creditors unable to avail themselves as a practical matter of the exception to foreign sovereign immunity that Congress intended them to have under the FSIA. These issues cry out for consideration by this Court.

A. The Republic Of Argentina's Global Debt Default

In 2001, in the largest sovereign debt default in history, the Republic of Argentina (the "Republic") defaulted on billions of dollars in bonds it issued to

investors in New York. The Republic waived sovereign immunity from suit in New York in connection with its bonds[1] and, since 2001, hundreds of investors have obtained or are in the process of obtaining final money judgments against the Republic in the Southern District of New York. The judgments total in the billions of dollars, which the Republic refuses to pay.[2] Petitioners are judgment creditors of the Republic with outstanding money judgments in excess of $550 million.

B. The Republic's Nationalization Legislation

From 1993 to 2008, the Republic maintained a dual pension system for its citizens: a public pay-as-you-go "Distribution System" administered by the state and a private "Capitalization System" comprised of individual contributions to accounts managed by private corporations on behalf of individual pensioners. App. 6a (*Aurelius III*, 584 F.3d at 124-25). The private corporations administering the funds in the Capitalization System "invested the funds to grow" in garden-variety investment accounts, at

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[1] It is undisputed that the Republic waived sovereign immunity from jurisdiction in the Southern District of New York under 28 U.S.C. § 1605. *See* App. 5a (*Aurelius Capital Partners, LP v. Rep. of Arg.*, 584 F.3d 120, 124 (2d Cir. 2009) (*Aurelius III*)).

[2] As the District Court concluded in an undisturbed finding of fact on appeal, the Republic has sought at every turn to evade its New York judgment creditors. App. 36a (*Aurelius Capital Partners, LP v. Rep. of Arg.*, No. 07 Civ. 2715 (TPG), 2009 WL 755231, at *5 (S.D.N.Y. March 12, 2009)) (Dec. 11, 2008 Opinion as amended) (*Aurelius I*) (stating that anyone who has observed the litigation in the District Court since 2001 concerning the Argentine global debt default will have seen the Republic's "resistance in every possible way to avoid paying lawful judgments on this debt").

least $200 million of which were held "in New York accounts" maintained by third-party financial institutions acting on behalf of the private corporations. *Id.*

On October 21, 2008, the Republic introduced legislation to nationalize the private pension system. *Id.* The terms of the legislation provided that "the majority of the funds previously administered by the private corporations [would] be transferred ***in kind***" to the Republic's Social Security Administration (*Administración Nacional de Seguridad Social*, or "ANSES") and that the funds would thereafter be invested by the government, rather than by the private corporations. App. 9a-10a (*Id.* at 126) (emphasis added). The nationalization legislation took effect on December 9, 2008, *id.*, and by its terms "transferr[ed] legal control of the funds from the private corporations to [ANSES]." App. 20a (*Id.* at 131). As provided in the legislation and its accompanying regulations, the assets were transferred ***"as a matter of law, in the same kind as that in which they are invested."***[3] Thus, upon transfer of

[3] Specifically, and as the record on appeal reflected, the legislation provided that "[t]he resources comprising the individual capitalization accounts . . . are to be transferred ***in kind*** to [ANSES]." App. 89a (Law 26,425, Art. 7, Dec. 9, 2008 (emphasis added) (A-2506)). To effect the transfer of ownership "in kind", the law's regulations provided that "[t]he transfer of the resources comprising the individual capitalization accounts . . . will occur ***as a matter of law, in the same kind as that in which they are invested. For this purpose, financial institutions, Central Securities Depositories, Mutual Fund Management Companies and all depository or collection entities shall establish [ANSES] as the sole and exclusive holder of those assets and rights.***" App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008) (emphasis added) (A-2513).

legal ownership to the Republic, the Republic specifically chose to assume control and "use" of the assets invested through accounts held at New York financial institutions in the same manner in which they had been held and invested (*i.e.*, "used") by the private corporations from which the accounts were nationalized. Such a transfer of ownership meets the very definition of "nationalization". *See Nemariam v. Fed. Dem. Rep. of Eth.*, 491 F.3d 470, 481 (D.C. Cir. 2007) ("[T]o 'nationalize' is to 'invest in the central government of a nation the control or ownership of' property.") (citing Webster's Third New International Dictionary 1505 (3d ed. 1993)); *see also Alperin v. Vatican Bank*, No. C-99-04941 (MMC), 2007 WL 4570674, at *9 n.8 (N.D. Cal. Dec. 27, 2007) (defining "nationalize" as to "bring . . . under governmental control or ownership") (citing Black's Law Dictionary 1052 (8th ed. 2004)). The Republic could have sought to nationalize the assets in some fashion other than it did—"in kind" and *in situ* as invested through accounts maintained at financial institutions in the United States—but it did not.

C. 28 U.S.C. § 1610(a)

Where, as is undisputed here, the "foreign state has waived its immunity from suit," creditors of a foreign state may attach or execute against property of the foreign state "used for a commercial activity in the United States." App. 87a (28 U.S.C. § 1610(a)). Section 1603(d) of the FSIA, in turn, defines "commercial activity" as follows:

> A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be

> determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

App. 86a (28 U.S.C. § 1603(d)). The legislative history of the FSIA specifically notes that "[a]ctivities such as a foreign government's . . . investment in a security of an American corporation, would be among those included within the definition" of commercial activity. H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 1976 WL 14078, at *6615.

D. Proceedings Below

i. District Court

On October 29, 2008, following announcement of the Republic's legislation to nationalize private pension accounts, Petitioners sought by order to show cause in the District Court for the Southern District of New York (Griesa, J.) authorization under 28 U.S.C. § 1610(a) and (c), to execute their judgments on investment accounts located in New York upon those accounts being nationalized and acquired "in kind" by the Republic as a result of the legislation. In order to preserve the District Court's jurisdiction to address whether investment accounts nationalized "in kind" are "used for a commercial activity in the United States" as would subject them to attachment or execution under Section 1610(a) of the FSIA, Petitioners initially sought and obtained in the District Court narrow restraining orders that prevented the Republic from removing the assets in the investment accounts from the United States while Petitioners' application for authorization to execute their judgments on the accounts remained pending.

App. 7a-8a (*Aurelius III*, 584 F.3d at 125); App. 28a (*Aurelius I*, 2009 WL 755231, at *1-2); App. 79a (Oct. 29, 2008 Order (A-74-75)). Significantly, "[t]he restraining notices did not prohibit the parties from engaging in daily trading activities, provided that no property left the United States." App. 8a (*Aurelius III*, 584 F.3d at 125). Accordingly, the Aurelius Parties *did not* purport to attach, levy upon, or seize the assets upon the legislation taking effect—a fact that the Second Circuit singularly and inexplicably misunderstood. Rather, the restraining orders, by their terms, merely preserved the District Court's jurisdiction to address whether the investment accounts became subject to attachment and execution under the FSIA as a result of being nationalized "in kind". App. 79a (Oct. 29, 2008 Order (A-74-75)).

On December 11, 2008, and following the December 9 nationalization of the investment accounts *in situ* and "in kind", the District Court issued an Opinion holding, pursuant to Section 1610(a) of the FSIA, that the accounts were property of the Republic "used for a commercial activity in the United States" and therefore not subject to foreign sovereign immunity from attachment or execution. App. 49a, 53a (*Aurelius I*, 2009 WL 755231, at *11, 13). Specifically, the District Court determined (i) that the Republic's Social Security Administration, ANSES, to which ownership of the nationalized investment accounts was transferred by the Republic "in kind", was a political subdivision of the Argentine government, not a separate "agency or instrumentality", and therefore subject to liability for the Republic's debts; (ii) that the Republic exercised practical control over the pension assets even while they were held and invested by private corporations and prior to nationalizing them and, upon nationalizing

them on December 9, 2008, assumed unfettered discretion and control to use the nationalized pension assets in any manner the executive branch of the Argentine Government pleased, and not necessarily for any pension-related objective, and (iii) that the specific investment accounts restrained and subject to attachment and execution in New York, were *not* needed for any pension-related function, but simply "are being invested in the hope of profit in the manner that any investor would so invest." App. 36a-37a, 48a, 53a (*Id.* at *5-6, *11, *13).[4]

On March 4, 2009, the District Court issued an Order implementing its earlier Opinion, authorizing Petitioners and other creditors for the first time to proceed to levy by service of attachment orders and/or writs of execution on the garnishee financial institutions that maintained the restrained investment accounts, pursuant to New York State judgment enforcement procedures. App. 11a (*Aurelius III*, 584 F.3d at 127); App. 64a-66a (*Aurelius Capital Partners, LP v. Rep. of Arg.*, No. 07 Civ. 2715 (TPG), 2009 WL 577281, at *2 (S.D.N.Y. Mar. 4, 2009 (*Aurelius II*)); *see* N.Y. C.P.L.R. §§ 5232, 6214.[5] However, the District Court directed in its Order that the Marshals Service refrain from actually seizing the

[4] App. 53a (*Aurelius I*, 2009 WL 755231, at *13) ("There is no indication that the funds at issue in the present case have been subject to continuous deposits and withdrawals for the purpose of actually paying pension benefits or any other governmental expenses. If this were the case, the court would surely have been informed of it. The only reasonable conclusion from the present record is that the funds are being invested in the hope of profit in the manner that any investor would so invest.").

[5] State-law judgment enforcement procedures apply in federal court pursuant to Federal Rules of Civil Procedure 64 and 69.

accounts until further order of the District Court, pending appeal by the Republic to the Second Circuit Court of Appeals.

Other judgment creditors that joined the application of Petitioners, namely EM Ltd. and NML Capital, Inc., obtained "me too" orders that mirrored the language of the restraining notices obtained by the Aurelius Parties. App. 8a (*Aurelius III*, 584 F.3d at 125); App. 28a (*Aurelius I*, 2009 WL 755231, at *1-2). The EM/NML orders, by their terms, also served *only* to restrain the assets from being removed from the United States pending authorization from the District Court to attach or execute upon the assets under the FSIA, while permitting those assets to continue to be actively traded by the Republic upon assuming the same investment use of the assets "in kind" as the private corporations before it. App. 29a (*Aurelius I*, 2009 WL 755231, at *2). The EM/NML orders were labelled "attachment orders" but, as is the subject of litigation still pending before the District Court to determine various competing creditor claims to "priority" over the assets, those orders never effected any "attachment", levy, or seizure as a matter of New York law—a question of State law that, in any event, was never any part of the appeal nor addressed by the Second Circuit's decision.

Because the District Court's various orders, by their terms, prevented only the removal of the assets in the investment accounts from the jurisdiction, and otherwise expressly allowed for trading activity in the accounts to continue, they did not prevent the nationalization and transfer of legal ownership of the assets in the investment accounts to the Republic "as a matter of law, in the same kind as that in which they [we]re invested" when the Republic's

nationalization legislation took effect on December 9, 2008.[6] In the months that followed, and pursuant to the terms of the legislation, the Republic adopted "in kind" the same "use" of the assets in the investment accounts held at financial institutions in New York as the private corporations from which the Republic specifically nationalized the invested assets "in kind".

ii. Court of Appeals

On October 15, 2009, following an expedited appeal, a two-judge panel[7] of the Second Circuit Court of Appeals vacated the orders of the District Court. The panel erroneously concluded that the District Court's orders "attached" the assets in the investment accounts from the moment the Republic first acquired legal ownership over the accounts "in kind", and therefore prevented the Republic from having an opportunity to "use" the accounts for a "commercial activity" within the meaning of Section 1610(a) of the FSIA. In so holding, the panel either accepted or ignored, without reviewing, virtually all of the District Court's factual determinations (i) that ANSES was a part of the executive branch, not a separate instrumentality, (ii) that the Republic

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[6] App. 89a (Law 26,425, Art. 7, Dec. 9, 2008 (A-2506)); App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008 (A-2513)); *see also* App. 9a-10a, 20a, (*Aurelius III*, 584 F.3d at 126, 131 (acknowledging that the law took effect and transferred legal control of the assets to the Republic in accordance with its terms)).

[7] The Honorable J. Clifford Wallace, sitting by designation from the Ninth Circuit Court of Appeals, wrote the decision for the panel. The Honorable Sonia Sotomayor was part of the panel that heard oral argument, but was elevated to this Court shortly thereafter, and did not take part in the decision. App. 4a (*Aurelius III*, 584 F.3d at 123).

exercised effective control over the nationalized assets even before they were nationalized, (iii) that as a result of nationalization the assets became available to the executive branch of the Argentine government for any purpose it chose, including non-pension related government activities, and (iv) that the investment accounts were indeed used for a commercial activity in the United States at the time the Republic chose to assume legal ownership over their use *"as a matter of law, in the same kind as that in which they are invested"*—a fact the panel deemed to be legally "irrelevant" under the FSIA. App. 20a (*Aurelius III*, 584 F.3d at 131). Sweeping all of the District Court's undisturbed findings of fact aside, the paned erroneously concluded that none of those findings mattered because the narrow restraining orders preventing only the removal of the property from the United States, so as to preserve the District Court's jurisdiction to address the question of sovereign immunity, had the effect of precluding the Republic's "use" of the accounts "in kind" for a commercial activity within the meaning of the FSIA—thus altering the very determination those orders merely sought enable the District Court to make. *Id.*

On October 29, 2009, Petitioners moved for rehearing by a three-judge panel of the Second Circuit Court of Appeals or for rehearing *en banc*. That request was denied on November 23, 2009. App. 67a (Nov. 23, 2009 Order). On December 2, 2009, the Court of Appeals recalled the mandate in the case, which had issued erroneously and without notice to Petitioners on November 30, 2009, and ordered that the mandate be stayed pending the present petition for a writ of *certiorari*. App. 74a (Dec. 2, 2009 Order); App. 70a (Dec. 4, 2009 Order).

REASONS FOR GRANTING THE PETITION

Because private actors routinely invest in U.S. securities markets through investment accounts maintained by financial institutions on their behalf, a foreign government's nationalization and expropriation of all legal ownership and control over such use of investment accounts in the United States, *specifically and expressly* "in the same kind as that which they are invested", manifests commercial "use" within the meaning of the FSIA and this Court's definition of "commercial activity" in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-17 (1992). This is the case regardless of whether the foreign government chooses to buy, sell, trade or simply *hold* the assets in those accounts upon nationalizing them. The Second Circuit's decision to the contrary contradicts this Court's decision in *Weltover* and allows a foreign government to reach into New York to nationalize and seize, as and for its own "use", investment accounts maintained by third-party banks in New York on the foreign government's behalf, while remaining judgment-proof from all of the New York creditors that hold billions of dollars in unpaid debt issued by that foreign government in New York.

The Court of Appeals further undermined the exception to foreign sovereign immunity by concluding that narrowly-tailored restraining orders, which prevented only the removal of property from the United States so as to preserve the District Court's jurisdiction to decide Petitioners' right to execute on the property under the FSIA, essentially conferred immunity on the property by preventing the Republic's "use" of the accounts for a commercial activity within the meaning of the FSIA. But if

the property had not been restrained long enough for the District Court to make the factual and legal determinations necessary to decide that the FSIA exception to immunity applied, the property would have been removed from the United States and the District Court deprived of jurisdiction to address that very question.

By providing a narrow exception to sovereign immunity from attachment and execution under the FSIA, Congress could not have intended that the exception be *de facto* unavailable to U.S. judgment creditors as a result of a foreign state's ability simply to remove the property from the United States and place it outside the jurisdiction of the U.S. courts before a court can determine that the exception to immunity applies. Here, the Republic made a decision to nationalize private property used for a commercial activity in the United States and specifically to adopt that use "in kind" as its own. Petitioners immediately sought a determination of their right to execute on the assets under the FSIA if so nationalized and obtained a narrow restraining order to protect the jurisdiction of the District Court to make that determination. Had Petitioners not done so, the Republic surely would have removed the assets from the United States to make itself judgment-proof and deprive the District Court of jurisdiction over the assets immediately upon learning of Petitioners' application for a determination that the assets were not immune under the FSIA. Significantly, though the Republic presumably could have withdrawn or rewritten its nationalization legislation and *not* seized commercial property "in kind" in the United States from private investors, it did not. It went ahead with the nationalization and seized the property anyway.

The Court of Appeals' decision, neglecting as it does both the nature of modern commercial investment activity and the cat-and-mouse procedural realities of judgment enforcement against a recalcitrant debtor's assets, will reverberate throughout the hundreds of cases already pending in the United States against the Republic of Argentina and will invite other foreign governments that choose to avail themselves of the U.S. financial markets to similarly organize their commercial activities here—and/or freely to nationalize and expropriate private commercial assets located here—in a way that allows form to prevail over substance and renders their activities effectively judgment-proof. This is an outcome that neither Congress, nor this Court, ever intended. Absent review by this Court, a judgment creditor's ability to attach or execute upon a foreign state's investment holdings in the United States is now in doubt.

I. A FOREIGN STATE'S OWNERSHIP OF INVESTMENT ACCOUNTS IN THE UNITED STATES CONSTITUTES "USE" OF THE PROPERTY IN THE ACCOUNTS FOR A "COMMERCIAL ACTIVITY IN THE UNITED STATES"

Where, as is undisputed here, a "foreign state has waived its immunity from suit," creditors of the foreign state may attach or execute on property of the foreign state that is "used for a commercial activity in the United States." App. 87a (28 U.S.C. § 1610(a)). The funds at issue in the present case—which the Republic nationalized and seized ownership of on December 9, 2008 (when no "attachment" or levy of the assets had occurred)—are held through investment accounts at leading financial institutions in the

United States and generate investment returns through trading in garden-variety securities. App. 6a, 9a-10a (*Aurelius III*, 584 F.3d at 124, 126). Yet, in a departure from the well-established authority of this Court, the Court of Appeals held that the Republic had no "opportunity to use the funds for any commercial activity whatsoever" before the assets were "attached" by creditors of the Republic. App. 20a (*Id. at* 131). Apart from mistaking the procedural posture of Petitioners' New York judgment enforcement devices at the time the Republic nationalized and assumed "in kind" the same use of New York investment accounts as private investment managers from which the Republic expropriated the accounts, the decision is of much broader concern because it ignores this Court's precedent that the "commercial activity" exception to foreign sovereign immunity should be based upon the manner in which private actors participate in the marketplace. By failing to apply the appropriate test, the Court of Appeals' decision erroneously carves out of Section 1610(a) perhaps one of the most common varieties of commercial investment activity engaged in by private actors: *holding* assets for investment and return passively, through third-party financial professionals acting on the investor's behalf.

A. The Republic Chose To Assume Ownership Of, And To Use "In Kind", Investment Accounts Held At New York Financial Institutions In The Same Manner In Which A Private Actor Invests In the Market And Therefore "Used" The Assets In Those Accounts "For A Commercial Activity in the United States"

In *Weltover*, this Court examined the FSIA's definition of "commercial activity" in detail, and explained that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 504 U.S. at 614. Other courts—and past decisions of the Second Circuit—are faithful to this well-established rule. *See, e.g., Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 289 (4th Cir. 2004) ("*Weltover* thus makes clear that whether conduct is commercial within the meaning of the FSIA depends on whether that conduct is of the type by which a private party engages in trade and traffic or commerce, regardless of the motive that leads the foreign state to engage in the conduct.") (internal quotations and citation omitted); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Rep.*, 877 F.2d 574, 578 (7th Cir. 1989) ("If a private person could have engaged in the same *type* of activity, then the sovereign has presumptively engaged in 'commercial activity' within the meaning of the FSIA . . . ."); *Tex. Trading & Milling Corp. v. Fed. Rep. of Nig.*, 647 F.2d 300, 309-10 (2d Cir. 1981) ("[I]f the activity is one in which a private person could engage, it is not entitled to immunity"; thus, "[i]f a government department goes into the market places

of the world and buys boots or cement as a commercial transaction that government department should be subject to all the rules of the marketplace.") (internal quotations and citation omitted); *Wasserstein Perella Emerging Mkts. Fin. LP v. Province of Formosa*, No. 97 Civ. 793 (BSJ), 2000 WL 573231, at *9 (S.D.N.Y. May 11, 2000) ("Retaining a private investment bank to raise money for a loan . . . is an inherently commercial transaction.").

In the present case, the Republic specifically and expressly acquired legal ownership and control of assets invested through New York investment accounts "as a matter of law, in the same kind as that in which they are invested" by private corporations. App. 9a-10a (*Aurelius III*, 584 F.3d at 126); App. 89a (Law 26,425, Art. 7, Dec. 9, 2008 (A-2506)); App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008 (A 2513)). At the time the legislation took effect, no order of the District Court served to "attach" the accounts or otherwise preclude the Republic from adopting "in kind" the same commercial use of the accounts to which they were already employed when the Republic nationalized and expropriated them from private investors.[8] Such "use" included

[8] The Aurelius Parties did not levy on the Republic's property held at third-party garnishee banks until authorized to do so by the District Court's March, 4, 2009 Order, months after the nationalization legislation took effect in December 2008. App. 11a (*Aurelius III*, 584 F.3d at 127 (noting that on March 4, 2009, the District Court issued an order authorizing the U.S. Marshals Service to serve the plaintiffs' writs of execution on garnishee financial institutions but directing that the assets not be seized pending further order of the Court)); App. 65a-66a (*Aurelius II*, 2009 WL 577281, at *2). The Court of Appeals' conclusion that "the order attaching the assets of the Administration was effective immediately upon transfer" presupposes a contested issue of New York law that is currently *sub judice* before the District

simply passively holding the accounts for investment. The District Court's orders only narrowly restrained the removal of the assets in the accounts from the United States to preserve the District Court's jurisdiction to address whether the assets in the accounts were subject to foreign sovereign immunity as a result of their nationalization. The orders did not prevent the Republic from assuming ownership and control of the accounts and holding the investments for its own benefit, nor even from actively trading in the accounts had it chosen so to do.

The Court of Appeals apparently concluded that the word "used" in Section 1610(a) required the Republic to engage in some form of active trading in the accounts in its own name before it could be said to have "used" the assets in the accounts for the same commercial activity to which they were previously put. But even assuming the Republic was prevented from doing so (the District Court's orders specifically did *not* prevent the Republic from trading in the accounts) the language of Section 1610(a), on its face, does not exclude property of a foreign state that is "used for a commercial activity in the United States" *on that foreign state's behalf*—such as here, where the property is held for investment through accounts maintained by third-party financial institutions—if that is what private actors may do.

Court and never was even presented on appeal. App. 19a (*Aurelius III*, 584 F.3d at 130). The purported "attachment" orders obtained by NML, to which the Court of Appeals refers, did not attach anything and only effected the same limited restraint against removal from the United States as the restraining notices obtained by the Aurelius Parties. The Aurelius Parties did not serve and levy by writ of execution until *after* the District Court authorized them to do so in March 2009. App. 11a (*Aurelius III*, 584 F.3d at 127); *see* N.Y. C.P.L.R. § 5232.

Nor does the language of Section 1610(a) exclude the possibility that a foreign state may choose not to actively trade an investment account and simply *hold* existing investments in the account, which is also something that private market actors may do. Indeed, private actors commonly invest in the United States merely by holding investment accounts that are managed by financial institutions acting on the investors' behalf, and which may or may not be actively traded at all. It is not necessary to buy, sell or trade investments to engage in the same kind of commercial investment activity in which private investors commonly engage by simply holding existing investments. This is precisely what the Republic decided to do in passing a law that provided for the transfer to the Republic of all legal ownership of existing investment accounts used for a commercial activity in the United States "as a matter of law, in the same kind as that in which they are invested". App. 9a-10a (*Aurelius III*, 584 F.3d at 126); App. 89a (Law 26,425, Art. 7, Dec. 9, 2008 (A-2506)); App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008 (A2513)).

The Republic chose to acquire ownership "in kind" from private investors and assume the same "use" of assets in investment accounts as those private investors. Upon so doing, the Republic continued in the same type of commercial activity in which any private actor might engage—and indeed in which the private owners of the accounts in fact did engage at the time the Republic expropriated the accounts from them. Nothing severed or discontinued the existing commercial use of the assets upon being nationalized by the Republic. To the contrary, the nationalization legislation directed that the same use be continued. The Court of Appeals failed to rec-

ognize or even address the Republic's decision to adopt "in kind" as its own "use" the same use for a commercial activity to which the nationalized assets were already employed at the time the Republic nationalized them. This was in error and contrary to the definition of "commercial activity" established by this Court in *Weltover*.

B. The Court of Appeal's Decision Implicitly Turned Upon The Republic's Future Speculative "Purpose" For The Assets In The Investment Accounts And Therefore Contradicts The Plain Language Of The FSIA And The Settled Precedent Of This Court

By concluding implicitly that "use" under the FSIA requires something more in the investment context than simply holding the investments as the Republic initially decided to do upon acquiring the investment accounts "in kind", the Court of Appeals failed to apply *Weltover*'s articulation of "commercial activity" in the practical terms of what private market actors may do (which includes nothing in the case of investments held for appreciation through a third party financial custodian), and effectively looked not to the "nature" of the activity in question but to its speculative *purpose*. This is contrary to the plain language of Section 1603(d) of the FSIA and this Court's holding in *Weltover* that the foreign government's *purpose* in engaging in market activity is irrelevant. *See* App. 86a (28 U.S.C. § 1603(d)); *Weltover*, 504 U.S. at 614.

As an initial matter, the Republic invariably would *have had* to liquidate and transfer out of the investment accounts the invested assets it had acquired

"in kind" and as already invested by private corporations before those same assets could be put to any conceivably different, much less non-commercial, use—a transaction that of-itself would have constituted commercial activity in which any private actor might engage. Only by exalting form over substance, and impermissibly speculating as to the future purpose to which the Republic *might* put the assets *after* engaging in such commercial activity could the Court of Appeals have come to the conclusion that it did.

As the plain language of Section 1603(d) makes clear, the commercial character of a foreign government's activity "is to be determined by reference to its 'nature' rather than its 'purpose'." App. 86a (28 U.S.C. § 1603(d)); *see also Weltover*, 504 U.S. at 614. It is *legally irrelevant* under the FSIA whether the *purpose* of Argentina's adoption, in kind and in the first instance, of commercial activity in the United States carried on by private corporations may (one day) be something different, and non-commercial. App. 86a (28 U.S.C. § 1603(d)); *Weltover*, 504 U.S. at 614; *see also, e.g., Tex. Trading*, 647 F.2d at 309 (Nigerian government's purchase of cement was commercial activity regardless of its purpose in making the purchase); *Libancell S.A.L. v. Rep. of Leb.*, No. 06 Civ. 2765 (HB), 2006 WL 1321328, at *3 (S.D.N.Y. May 16, 2006) (funds from Lebanon's issuance of capital notes in New York were "used for commercial activities" under Section 1610(a), regardless of ultimate purpose for which government was raising capital); *Daventree, Ltd. v. Rep. of Azer.*, 349 F. Supp. 2d 736, 750 (S.D.N.Y. 2004) (although the decision to privatize an industry may be sovereign, the conduct of raising capital and "navigat[ing] the world of private commerce to

achieve . . . financial goals" is commercial). This Court should address and correct the departure of the Second Circuit Court of Appeals from *Weltover* and the plain language of the FSIA.

II. A FEDERAL COURT MUST HAVE AUTHORITY TO NARROWLY RESTRAIN REMOVAL FROM THE UNITED STATES OF A FOREIGN STATE'S PROPERTY TO MAINTAIN JURISDICTION TO DETERMINE WHETHER THE PROPERTY IS "USED FOR A COMMERCIAL ACTIVITY IN THE UNITED STATES" WITHOUT UNDERMINING THAT VERY DETERMINATION

The decision of the Court of Appeals also raises substantial procedural questions under the FSIA which threaten to undermine the exception to foreign sovereign immunity that Congress intended creditors to have under the statute, as well as the authority of a district court under the All Writs Act to enter equitable orders as necessary to protect its jurisdiction to enforce a previously-entered judgment. 28 U.S.C. § 1651.

In order for property to be excepted from foreign sovereign immunity under Section 1610(a) and therefore subject to attachment or execution, a federal court must first determine as a threshold matter that the property in question is "used for a commercial activity in the United States." App. 87a (28 U.S.C. § 1610(a)); *Conn. Bank of Commerce v. Congo*, 309 F.3d 240, 247 (5th Cir. 2002) (stating that Section 1610(c) requires a court, rather than a court clerk, to enter a writ of execution directed to property of a foreign state so that the "court can determine whether the property in question falls within

one of the statutory exceptions to foreign sovereign immunity"); *Trans Commodities, Inc. v. Kazakstan Trading House, S.A.*, No. 96 Civ. 9782 (BSJ), 1997 WL 811474, at *3 (S.D.N.Y. May 28, 1997) (stating that Section 1610(c) prevents plaintiffs from executing judgments against foreign states until they obtain an order authorizing such execution in recognition that a foreign state's property is immune from attachment unless and until a federal court determines that it is not). To establish that property comes within the exception to sovereign immunity requires a mixed determination of fact and law that, particularly in the modern era of sophisticated financial markets and products, may entail a substantial degree of complexity. In order for a district court to have the opportunity to address such a question, even on a highly expedited basis (and putting aside any opportunity for discovery to resolve the issue), the court must have the ability to prevent the foreign state from removing, or otherwise altering the use of, the property in the United States while such a determination is pending. Otherwise the foreign state will be free to remove the property from "the United States", immediately upon receiving notice of a creditor's application to attach or execute a judgment against that property, before a federal court can ever decide if the property is excepted from sovereign immunity. Conversely, if a district court order narrowly restraining removal of a foreign state's property from the United States pending determination of whether the assets are excepted from sovereign immunity alters the outcome and prevents a finding that the property is "used" for a commercial activity in the United States, creditors are equally deprived of their ability

to avail themselves of the exception to sovereign immunity that Congress intended them to have.

Petitioners are frustrated by the impossible choice to which the Court of Appeals has put them: had Petitioners not sought to narrowly restrain removal from the United States of the nationalized investment accounts as of the moment the Republic planned to first seize the accounts "in kind", the Republic almost surely would have removed the assets in those investment accounts from the United States precisely so as to evade its U.S. creditors. Yet, by narrowly restraining removal of the assets in the investment accounts during the time necessary for the District Court to address the merits of Petitioners' right to attach/execute against the assets upon their nationalization, the Court of Appeals concluded that Petitioners are no less deprived of an opportunity to attach or execute their judgments against the accounts because the Republic supposedly never got to "use" the nationalized investment accounts for a commercial activity. This cannot be the law. Petitioners respectfully submit that the Court of Appeals' decision impermissibly constrains the exception to sovereign immunity provided by Section 1610, and the inherent authority of the courts to prevent removal of assets from the United States when that would frustrate a court's ability to enforce its judgment. *See In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1258-59 (7th Cir. 1980); 28 U.S.C. § 1651. As an issue of "preeminent importance" that is certain to recur in a broad variety of contexts under the FSIA, *Tex. Trading & Milling Corp.*, 647 F.2d at 302; *see also De Letelier v. Rep. of Chile*, 748 F.2d 790, 797 (2d Cir. 1984), it is one that the Supreme Court should grant a writ of certiorari to address and correct.

* * *

Left undisturbed, the two-judge decision of the Second Circuit Court of Appeals will remain the law of the Second Circuit and will stand in conflict with the holding of this Court in *Weltover* and the plain text of the FSIA, on a question of preeminent importance in a major global center of banking and investment activity. The Second Circuit will have departed from the analysis that this Court detailed in *Weltover*: identifying "commercial activity" by what private actors may do in the same commercial context and examining the nature—rather than the purpose—of the activity in which the foreign state has engaged. Here, the foreign state chose to acquire investment accounts "in kind" as they were already invested. The Republic did not have to do so; it chose to do so and thereby became a holder of investments through accounts maintained with financial institutions acting on its behalf just like any other private market participant may do. The Court of Appeals' rationale that an order merely preventing removal from the United States of investments acquired "in kind" somehow prevented their "use" in kind in the United States creates a procedural catch-22 for creditors under the FSIA. Either creditors of foreign states may not restrain property they uncover in the United States that is excepted from sovereign immunity long enough for a federal court to determine that the property is excepted from sovereign immunity or, if they do, then according to the Second Circuit, the property is no longer "used for a commercial activity" and the efforts of such creditors become self-defeating. Such an outcome renders the FSIA exception to foreign sovereign immunity for all practical purposes an

empty and meaningless gesture. This cannot have been what Congress intended.

CONCLUSION

For the reasons set out above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued: May 11, 2009 Decided: Oct. 15, 2009

Docket Nos. 08-5621-cv(L), 08-5619-cv(con), 08-5620-cv(con), 08-5622-cv(con), 08-5623-cv(con), 08-5624-cv(xap), 08-5626-cv(con), 08-5630-cv-(con), 08-5691-cv(con), 08-5692-cv(con), 08-5693-cv(con), 08-5694-cv(con), 08-5695-cv-(con), 08-5696-cv(con), 08-5697-cv(con), 08-5698-cv-(con), 08-5699-cv(con), 08-5700-cv(con), 08-5701-cv(con), 08-5702-cv(con), 08-5703-cv(con), 08-5705-cv(con), 08-5708-cv(con), 08-5709-cv(con), 08-5710-cv(con), 08-5711-cv(con), 08-5712-cv(con), 08-5713-cv(con), 08-5714-cv(con), 08-5723-cv(con), 08-5726-cv(con), 08-5727-cv(con), 08-5729-cv(con), 08-5730-cv(con), 08-5731-cv(con), 08-5734-cv(con), 08-5735-cv(con), 08-5737-cv(con), 08-5738-cv(con), 08-5740-cv(con), 08-5741-cv(con), 08-5744-cv(con), 08-5746-cv(con), 08-5747-cv(con), 08-5748-cv(con), 08-5749-cv(con), 08-5750-cv(con), 08-5751-cv(con), 08-5753-cv(con), 08-5754-cv(con), 08-5755-cv(con), 08-5756-cv(con), 08-5757-cv(con), 08-5758-cv(con), 08-5759-cv(con), 08-5760-cv(con), 08-5761-cv(con), 08-5762-cv(con), 08-5769-cv(con), 08-5771-cv(con), 08-5774-cv(con), 08-5775-cv(con), 08-5776-cv(con), 08-5778-cv(con), 08-5779-cv(con), 08-5780-cv(con), 08-5782-cv(xap), 08-5783-cv(con), 08-5790-cv(con), 08-5792-cv(con), 08-5793-cv(con), 08-5794-cv(con), 08-5796-cv(con), 08-5799-cv(con), 08-5800-cv(con), 08-5802-cv(con), 08-5803-cv(con), 08-5803-cv(con), 08-5807-cv(con), 08-5808-cv(con), 08-5811-cv(con), 08-5817-cv(con), 08-5821-cv(con),

08-5825-cv(con), 08-5829-cv(con) 08-5869-cv(con), 08-5870-cv(con), 08-5872-cv(con), 08-5885-cv(con), 08-5910-cv(con), 08-5813-cv(con), 08-5981-cv(con), 08-6133-cv(con), 08-6135-cv(con), 08-6136-cv(xap), 08-6137-cv(con), 08-6138-cv(con), 08-6242-cv(con), 08-6243-cv(con), 08-6249-cv(con), 08-6250-cv(con), 08-6251-cv(con), 08-6252-cv(con), 08-6253-cv(con), 08-6254-cv(con), 08-6255-cv(con), 08-6256-cv(con), 08-6257-cv(con), 08-6260-cv(con), 08-6261-cv(con), 08-6269-cv(con), 08-6270-cv(con), 09-0151-cv(con), 09-0155-cv(con), 09-0158-cv(con), 09-0160-cv(con), 09-0161-cv(con), 09-0163-cv(con), 09-0163-cv(con), 09-0164-cv(con), 09-0165-cv(con), 09-0525-cv(con), 09-0803-cv(con), 09-0812-cv(con).

AURELIUS CAPITAL PARTNERS, LP, *et al.*,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

Union de Administradoras de Fondos de Jubilaciónes y Pensiones, et al.,

Interested Parties,

Administración Nacional de Seguridad Social,

Interested-Party-Appellant.

Jonathan I. Blackman, Cleary Gottlieb Steen & Hamilton LLP (Carmine D. Boccuzzi, Christopher P. Moore, Rahul Muhki, Benjamine J.A. Sauter, and Michael J. Byars, on the brief), New York, NY, for Defendant-Appellee-Cross-Appellant Republic of Argentina.

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Before
WALKER and WALLACE,* Circuit Judges.**

J. CLIFFORD WALLACE, Senior Circuit Judge:

The Republic of Argentina (Republic) appeals from the district court's orders of attachment and execution (Thomas P. Griesa, *Judge)* entered in late 2008 over Argentine social security funds, which under proposed Argentine legislation were to be transferred to the Administración Nacional de Seguridad Social (the Administration). The orders were confirmed in the district court's opinion and order dated December 11, 2008, immediately after the legislation transferring the funds to the Administration became effective. The district court had jurisdiction pursuant to 28 U.S.C. § 1330. We have jurisdiction over the appeal from the district court's December 11, 2008 order and opinion pursuant to 28 U.S.C. § 1291, and we have jurisdiction over the restraining orders, orders of attachment and writs of execution pursuant to 28 U.S.C. § 1292(a)(1) and the collateral order doctrine described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Because we conclude that the funds were immune from attachment

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* The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

** The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(b); *United States v. DeSimone*, 140 F.3d 457 (2d Cir.1998).

under the Foreign Sovereign Immunities Act (Act), 28 U.S.C. §§ 1602-1611, we reverse the decision of the district court and vacate its orders.

I

In 2001, the Republic defaulted on payments on debt instruments issued to bondholders. In connection with the issuance of the Argentine bonds, the Republic had agreed to a waiver of sovereign immunity. As a result of the default, many bondholders, including the majority of the plaintiffs in this case, obtained judgments against the Republic. Since the judgments against the Republic were entered, the bondholders have attempted to recover on the judgments. Most of these attempts have been unsuccessful "because they concerned property that was immune from execution under the [Act] or property that did not belong to the Republic." *See* Br. of Def.-Appellant Republic of Argentina at 4-5, *citing*, *inter alia*, *Capital Ventures Int'l v. Republic of Argentina*, 280 Fed.Appx. 14, 15 (2d Cir.2008) and *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 475-76 (2d Cir.2007).

On October 21, 2008, the President of the Republic announced that private pension funds, held and managed on behalf of Argentine workers and pensioners, would be transferred to the Administration. This appeal stems from certain judgment holders' attempts to execute upon some of those funds in order to satisfy their judgments. Before describing the proceedings in the district court whereby the plaintiffs attempted to execute against the pension funds, background on the Administration and the private pension funds is necessary.

The Argentine constitution requires that the government provide social security benefits to its citizens. Const. of the Argentine Nation, First Part, Ch. 1, § 14bis, *available* at http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf (requiring that "[t]he State shall grant the benefits of social security, which shall be of an integral nature and may not be waived"). In 1991, the Republic adopted a decree creating a unified social security system, known as the "Distribution System." Later that year, the Administration was established for the purpose of administering the Distribution System. The Administration also administered other programs, including welfare and unemployment benefits. In 1993, the Argentine government reformed the pension system to create a hybrid regime that allowed Argentine workers and pensioners to choose between the Distribution System and a new private plan, the "Capitalization System." Under the Capitalization System, workers made contributions to individual accounts managed by private corporations, which administered the retirement and pension funds and provided payments and benefits due to the pensioners in exchange for management fees. By law, the assets in the funds were only to be used to provide social security benefits, and the private corporations did not have property rights in the funds' assets. Some of the funds were held in New York, where the private corporations invested the funds to grow for the benefit of the pensioners.

Dissatisfied with the Capitalization System, in 2007, the Argentine Congress passed a law that allowed Capitalization System participants to switch back to the Distribution System. In order to facilitate this transition, the Argentine Congress passed a

decree establishing the Sustainability Guarantee Fund (Guarantee Fund), which received the social security funds transferred from the Capitalization System and was managed by the Administration. The law establishing the Guarantee Fund provided that its assets could be used only to provide social security benefits to qualifying participants.

Then, on October 21, 2008, proposed legislation was introduced in the Argentine legislature requiring the reunification of the bifurcated social security system. The proposed legislation required all of the assets in the Capitalization System to be transferred to the Guarantee Fund. The proposed legislation also reaffirmed that assets in the Guarantee Fund may only be used to provide social security benefits for Argentine pensioners.

On October 29, 2008, the district court signed an Order to Show Cause in three of the cases brought by Aurelius Capital Partners and Blue Angel Capital against the Republic based on defaulted bonds. The Order to Show Cause set for hearing a motion to authorize the United States Marshals Service to serve a writ of execution covering the retirement and pension funds, and related property located in New York and belonging to the Republic, the Administration, and the private corporations holding the funds under the Capitalization System. Although the plaintiffs in the three initial cases moved for relief only against the Republic and did not name either the Administration or the private corporations as parties, the district court nevertheless authorized the plaintiffs to make immediate service of restraining notices to the Republic, the Administration and the private corporations, which prevented removal of the retirement and pension funds or any of their

assets from the United States. The restraining notices did not prohibit the parties from engaging in daily trading activities, provided that no property left the United States. The theory behind the orders was that once the proposed legislation had been enacted and the property had been transferred to the Administration, it would essentially become property of the Republic; if the property belongs to the Republic, then, because the Republic had waived sovereign immunity with respect to the bondholders' judgments, judgment could be executed against it.

Two days after the October 29 order, EM Ltd. and NML Capital, Ltd. obtained "me too" *ex parte* writs of execution and restraining notices in their respective post-judgment cases, as well as restraining orders and attachments of the funds managed by the Administration and/or the private corporations. By the end of November 2008, plaintiffs in 72 actions had obtained either writs of execution and restraining notices in post-judgment cases or restraining orders and orders of attachment in cases where judgment had not yet been entered (together, the Orders). The district court found that, as a result of the Orders, approximately $200 million was frozen in New York accounts, primarily investment accounts.

On November 12, 2008, the Republic moved to vacate the Orders, and the district court held a hearing on the motion on November 14, 2008. The Republic argued that it had no interest in the social security assets managed by the private corporations or the property administered by the Administration. It also argued that the Administration is an "agency or instrumentality" separate from the Republic for purposes of the Act, and that therefore, its assets are not available to creditors of the Republic. The

Republic further argued that the property managed by the Administration and the private corporations is used for a non-commercial purpose-payment of pension benefits-and that therefore, the Republic's creditors were precluded from executing upon the property under the Act. The Administration and the private corporations, appearing on a limited and special basis as interested non-parties, likewise opposed the plaintiffs' motions, arguing that the Administration was a juridically distinct, independent political subdivision of the Republic and therefore not liable for the Republic's debts. At the conclusion of the hearing, the district court continued the Orders. In ordering continuation of the previously entered orders, the court stated that it was exercising its "equitable power to simply hold the status quo and prevent assets from getting spirited out of the country." The court opined that it had previously only entered a "freeze order," and not an "attachment," which the court said would have been inappropriate at the time.

The district court also directed the parties to engage in discovery concerning, *inter alia*, the Republic's use of the social security assets, the Administration's institutional relationship to the executive branch of the Argentine government, and the location of any additional custodial assets that may be held in the United States. However, the Administration declined to participate in discovery, claiming that it was not required to submit to discovery because it was not a party to the action, and because the court lacked jurisdiction over it pursuant to the Act.

On December 9, 2008, the proposed legislation became law, mandating that the majority of the

funds previously administered by the private corporations be transferred in kind to the Guarantee Fund administered by the Administration in Argentina. The Argentine law states that the assets of the funds shall be invested "by applying criteria of sufficient security and profitability while contributing to the sustainable development of the real economy." Law 26,425, art. 8, Dec. 9, 2008. The law states that "[t]he total amount of the funds may only be employed to make payments in the Argentine Integrated Pension System." *Id.* The law further provides that social security funds managed by the Administration may be invested only in Argentine securities. *Id.*

On December 11, 2008, the district court issued an Opinion and Order granting the motions for writs of execution and confirming its prior Orders authorizing restraints and attachment of pension funds managed by the Administration and the private corporations. In its opinion, the district court held that the Administration is a political subdivision of the Republic, and therefore, the Administration is subject to the jurisdiction of the court because the Republic is subject to the court's jurisdiction; and similarly, the assets of the Administration are subject to attachment and execution to the same degree as are the assets of the Republic.

Next, the district court considered whether the plaintiffs had established that the funds were being "used for a commercial activity in the United States" as required by the Act. *See* 28 U.S.C. § 1610(a), (d). The district court recognized that the social security funds were required by Argentine law to be used solely to maintain the social security system, and that those funds were, at the time the orders were

signed, in the hands of the corporations, which were indisputably private entities. However, applying the Supreme Court's holding in *Republic of Argentina v. Weltover*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), the district court held that the funds were "used for a commercial activity in the United States" because the funds were invested in the hope of profit while under the administration of the private corporations, and because the transfer of the funds to the Administration was undertaken not for the benefit of the pension funds, but instead "to effectively appropriate funds for non-pension governmental uses." The district court concluded that the funds were not immune from attachment and execution under the Act. The district court also held that the restraining orders filed before the Argentine legislation took effect were valid.

On March 4, 2009, the district court issued an order authorizing the U.S. Marshal Service to serve the plaintiffs' writs of execution on garnishee financial institutions where the funds are currently held. However, the district court directed that the assets not be seized until further order of the court. Nevertheless, because the district court's prior orders "froze" the funds in the United States, the Administration has been unable to take possession of the funds, and the new law transferring the funds to the Administration has not been implemented. The Republic, the Administration, and the private corporations appeal from the district court's orders.

II

Before we discuss the appeal's substance, we must address a threshold jurisdictional question:

whether the Administration, a non-party appellant, has standing to challenge the district court's issuance of the Orders.

In this case, the plaintiffs did not name the Administration as a party to the actions to enforce judgments against the assets of the Administration. The Administration appeared on a special and limited basis before the district court to argue in favor of vacating the district court's Orders regarding attachment and execution. The Administration filed a memorandum and declarations in opposition to the Order to Show Cause and restraining orders. On appeal, the Administration filed a brief as a non-party appellant and appeared at oral argument. Plaintiffs-Appellees GMO Emerging Country Debt L.P., GMO Emerging Country Debt Investment Fund PLC, GMO Emerging Country Debt Fund, and Teachers Insurance and Annuity Association of America (together, GMO) argue that the Administration, as a non-party to this action, does not have standing to offer argument in the appeal from the district court's decision because the Administration did not intervene in the district court proceedings.

Although "[s]tanding to appeal is an essential component of our appellate jurisdiction, . . . [t]he question of nonparty standing to appeal 'does not implicate the jurisdiction of the courts under Article III of the Constitution.' " *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77 (2d Cir.2006) *quoting Devlin v. Scardelletti*, 536 U.S. 1, 6, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). "Rather, the issue is whether an appellant should be treated as a party for purposes of appealing a judgment when it was not a party in the proceedings below." *Id.* "As a general rule, only a party

of record in a lawsuit has standing to appeal from a judgment of the district court." *Hispanic Soc'y of the N.Y. City Police Dep't v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir.1986). There is, however, an exception to this rule when "the nonparty has an interest that is affected by the trial court's judgment." *Id.* The putative appellant must be able to "identify an 'affected interest.'" *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir.1999), *quoting United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 183-84 (2d Cir.1991); *see WorldCom*, 467 F.3d at 78 (a nonparty need not "prove that it has an interest affected by the judgment," but only "stat[e] a plausible affected interest").

In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, we addressed an analogous challenge to a non-party's standing to appeal. 313 F.3d 70, 81-82 (2d Cir.2002). In that case, a limited liability company sought to enforce an arbitral award against Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia. *Id.* at 75. Pertamina was deemed an "agency or instrumentality" of Indonesia for purposes of the Act. *Id.* at 75-76. The Republic of Indonesia was not named as a party. *Id.* at 81. On appeal, we acknowledged that in general, a party's absence from the initial proceedings and its failure to intervene would preclude its participation in the appeal. *Id.* However, we held that because the Republic of Indonesia had alleged that it "owns the property encompassed by the garnishment order . . . this constitutes an 'affected interest,' which entitle[d] the [Republic of Indonesia] to join this appeal." *Id.* at 82.

In the case before us, the Administration clearly has an interest that is affected by the district court's orders. The Orders attach and execute upon funds that, on implementation of the December 2008 Argentine law, are administered by the Administration. The position of the Administration is analogous to that of the non-party Republic of Indonesia in *Karaha Bodas*, except that, in *Karaha Bodas*, the agency was named as a party but the parent republic was not, whereas in this case the Republic was named as a party and the Administration was omitted. If anything, the appropriateness of the Administration's standing to appeal is even stronger in this case than in *Karaha Bodas*, because it is the Administration's property at stake. The Administration, as the entity that manages the funds, has an even more direct interest in the property deemed subject to attachment and execution than the Republic of Indonesia had in *Karaha Bodas*.

GMO argues that where a proposed appellant had an opportunity to intervene but failed to do so before the district court, the nonparty does not have standing to appeal, even if it has an interest affected by the district court's judgment. Relying on a Supreme Court case, *Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988), GMO argues that, for policy reasons, the Administration should not reap the benefit of being allowed to make arguments on appeal where it failed to intervene in the district court proceedings. In *Marino*, petitioners, a group of individuals who claimed to have been adversely affected by a settlement in an employment discrimination case, chose not to intervene in the district court proceedings. *Id.* at 303, 108 S.Ct. 586. Instead, the petitioners filed their action during the

time between the district court's interim approval of a settlement and its issuance of a final consent decree. *Id.* The district court dismissed the petitioners' action, and the court of appeals upheld the dismissal, holding that it constituted an impermissible collateral attack on a consent decree by persons who could have intervened in the action but chose not to. *Id.* at 303-04, 108 S.Ct. 586. The issue in that case was whether the district court may dismiss an impermissible collateral attack by non-parties. *Id.* at 304, 108 S.Ct. 586. The Court affirmed the district court's disallowance of the action by the petitioners. *Id.* (stating "[w]e think the better practice [than to allow a nonparty to appeal in an action like *Marino*] is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable").

The Administration's interest in this litigation is qualitatively different from the *Marino* petitioners' interest. The plaintiffs in this case are attempting to execute upon the property of the Administration. The plaintiffs chose not to make the Administration a party to the action, even though the Administration's interest is directly affected. Unlike the petitioners in *Marino*, who claimed a tangential harm from a settlement but chose not to intervene, it is difficult to imagine a situation where the property of a party will be more affected by the court's decision than the property of the Administration here. *Cf. Hispanic Soc'y*, 806 F.2d at 1152 (dismissing nonparty appellant's appeal because the putative appellants had no affected interest in the employment discrimination litigation as they had no right to promotion and did not allege any discrimination against themselves). Further, in *Marino*, the district court

had dismissed the petitioners' action. In this case, the district court permitted the Administration to participate in the district court proceedings as a non-party. *Marino* does not govern this case.

GMO also argues that the interest of the Administration is fully and amply protected by the Republic's arguments on appeal. GMO does not offer persuasive support for this argument. Instead, GMO cites Federal Rule of Civil Procedure 24, which governs the rules of intervention. The Administration did not seek to intervene in the district court proceedings, so Rule 24 does not apply to this case.

We therefore hold that the Administration has standing to appeal the district court's orders as a nonparty appellant.

III

GMO also argues that the district court erred in allowing the Administration to submit memoranda and declarations, and to offer argument in the district court proceedings in opposition to the Orders, because the Administration invoked sovereign immunity during the discovery process. To the extent GMO raises an evidentiary challenge, GMO does not point to any evidence that it believes should have been stricken from the record; therefore, there is no evidentiary ruling for us to consider on appeal. Further, insofar as GMO challenges the district court's decision to allow the Administration to submit memoranda of points of law regarding the Orders, we have stated that it is "essential for the district court to afford the parties the opportunity to present evidentiary material . . . on the question of FSIA jurisdiction. The district court should afford

broad latitude to both sides in this regard." *Reiss v. Société Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir.2000). Although this statement is not directly controlling because the Administration was not a party to the case, it supports the idea that a district court is afforded broad discretion in its determination of jurisdictional issues. The district court acted well within its discretion to consider arguments presented by the Administration to secure a full understanding of the jurisdictional issues.

IV

We next turn to the primary issue on appeal: whether the funds administered by the Administration are subject to attachment. We review *de novo* legal conclusions denying Act immunity to a foreign state or its property. *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 79 (2d Cir.2008). We review the district court's ruling on a request for an order of attachment for abuse of discretion. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 472 (2d Cir.2007). The district court abuses its discretion if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law. *Id.*

Under section 1609 of the Act, property in the United States of a foreign state is immune from attachment or execution unless the property fits within one of the limited exceptions enumerated in sections 1610 or 1611 of the Act. 28 U.S.C. § 1609. The provisions of section 1611 are not applicable to this case. *See* 28 U.S.C. § 1611. We therefore focus

on section 1610(a), which authorizes execution against property of a foreign state located in the United States only if the property is "used for a commercial activity in the United States," even if the foreign sovereign has waived its immunity. 28 U.S.C. § 1610(a); *see also EM Ltd.*, 473 F.3d at 481 n. 19 ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against 'property in the United States. used for a commercial activity in the United States.'" (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir.2002))).

Thus, the property that is subject to attachment and execution must be "property in the United States of a foreign state" *and* must have been "used for a commercial activity" *at the time* the writ of attachment or execution is issued. "Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria." *Conn. Bank*, 309 F.3d at 247. This clearly follows from the plain language of section 1610(a). Section 1610(a) does not say that the property in the United States of a foreign state that "*will* be used" or "*could potentially* be used" for a commercial activity in the United States is not immune from attachment or execution. More is required: the property in the United States of a foreign state must be used for a commercial activity in the United States "upon a judgment entered by a court of the United States or of a State." 28 U.S.C. § 1610(a). "To conclude otherwise would render meaningless the provisions of §§ 1610(a) & (d), which subject to attachment property of a foreign state when the property is 'used for a commercial activity' *and* when the foreign state

'has waived its immunity from attachment.'" *EM Ltd.*, 473 F.3d at 481 n. 19; *cf. FG Hemisphere Assocs., LLC v. République du Congo*, 455 F.3d 575, 594 (5th Cir.2006) (holding that "[p]rior to issuing a garnishment order, a district court must make factual findings that support application of the § 1610(a) exception to executional immunity," and therefore, the court must determine the location of each form of property at time of issuance of the order to ensure that it governs property located in the United States).

On appeal, the parties focus largely on whether the Administration qualifies as an "agency or instrumentality" of the Republic under section 1610(b) of the Act. However, even if the Administration is not a separate "agency or instrumentality" for purposes of the Act, but instead is a political subdivision of the Republic, we must first determine whether the funds were being used for a commercial activity in the United States as of the effective date of the Argentine legislation transferring the funds to the control of the Administration. If not, the funds are not subject to attachment or execution, regardless of the Administration's independent juridical status or lack thereof.

The district court issued its opinion two days after the Republic adopted the legislation authorizing the retirement and pension funds to be transferred to the Administration. The order attaching the assets of the Administration was effective immediately upon the transfer.

The Act is clear: "The property in the United States *of a foreign state* " must be "used for a commercial activity in *the United States* " before it is susceptible to attachment and execution. 28 U.S.C.

§ 1610(a) (emphasis added). The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry. The plaintiffs do not argue that the private corporations were acting as the alter ego of the Republic. Therefore, before the retirement and pension funds at issue could be subject to attachment, the funds *in the hands of the Republic* must have been "used for a commercial activity." Because the order attaching the assets of the Administration became effective immediately upon the passage of legislation transferring the assets from the private corporations to the Administration, neither the Administration nor the Republic had the opportunity to use the funds for any commercial activity whatsoever. The only activity that the Republic had engaged in with regard to the funds at the time that the district court confirmed the Orders was the adoption of a law transferring legal control of the funds from the private corporations to the Administration. As we read "used for a commercial activity," we hold that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity." A contrary conclusion would essentially nullify the Act's commercial activity requirement in cases involving attachment and execution of a foreign state's property.

Thus, we conclude that the district court abused its discretion in issuing the Orders. The Republic had not used the funds for any commercial activity at the time of attachment. Under the plain language of 28 U.S.C. § 1610(a), the funds are immune from attachment.

V

On appeal, the Administration argues that it is an "agency or instrumentality" separate from the Republic, and therefore, its interest in the funds is not subject to attachment or execution because the Administration has not waived its sovereign immunity. The district court held that the Administration is not a separate "agency or instrumentality," but rather, it is a political subdivision of the Republic. We need not reach this issue, as we have determined that neither the Administration nor the Republic used the funds for a commercial activity in the United States. We therefore need not determine whether the Administration is a juridically independent "agency or instrumentality" separate from the Republic for purposes of the Act.

The Republic and the Administration also argued that the funds at issue are expressly designated by Argentine law as social security assets, and therefore, their investment (and concomitant payment to Argentine pensioners) is a quintessentially governmental activity, and not a commercial activity under the Act. *See* 28 U.S.C. § 1610(a) and (b). Again, we need not reach this issue, as we have determined that neither the Administration nor the Republic used the funds for a commercial activity in the United States for the same reason as stated above: the accounts were attached as soon as the Administration gained legal title to them. Even assuming (without deciding) that there may have been commercial activity prior to that time in the form of investment of the assets, it is undisputed that such activity was undertaken by private corporations, on

behalf of pensioners, not by the Republic or the Administration.

Also, because we hold that the retirement and pension funds are not property subject to attachment and execution under the Act, we need not address the propriety of the district court's issuance of the restraining orders prior to the passage of the legislation transferring the funds, when the funds were still the property of the private corporations.

CONCLUSION

We understand the frustration of the plaintiffs who are attempting to recover on judgments they have secured. Nevertheless, we must respect the Act's strict limitations on attaching and executing upon assets of a foreign state.

For the foregoing reasons, we reverse the district court's judgment and vacate all of the associated orders, as well as its opinion confirming those orders.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

March 12, 2009
No. 07 Civ. 2715 (TPG)

AURELIUS CAPITAL PARTNERS, LP and
AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

—v.—

The REPUBLIC OF ARGENTINA,

Defendant.

Lightwater Corp. Ltd. v. Republic of Argentina (02 Civ. 3804) Lightwater Corp. Ltd. v. Republic of Argentina (02 Civ. 3804) Old Castle Holdings, Ltd. v. Republic of Argentina (02 Civ. 3808) Allan Applestein TTEE FBO D.C.A. Grantor Trust, et al. v. Republic of Argentina (02 Civ. 4124) Etevob et al. v. Republic of Argentina & Province of Buenos Aires (03 Civ. 1680) EM Ltd. v. Republic of Argentina (03 Civ. 2507) Franceschi et al. v. Republic of Argentina (03 Civ. 4693) Mazzini et al. v. Republic of Argentina (03 Civ. 8120) NML Capital Ltd. v. Republic of Argentina (03 Civ. 8845) Denchu Investment Corp. v. Republic of Argentina (03 Civ. 9538) Prima et al. v. Republic of Argentina & Province of Buenos Aires (04 Civ. 1077) Mazoral S.A. v. Republic of Argentina

(04 Civ. 3313) Morata et al. v. Republic of Argentina (04 Civ. 3314) Moldes et al. v. Republic of Argentina & Province of Buenos Aires (04 Civ. 6137) Cilli et al. v. Republic of Argentina (04 Civ. 6594) Buczat et al. v. Republic of Argentina (04 Civ 7056) Rosa et al. v. Republic of Argentina (04 Civ. 7504) Consolini et al. v. Republic of Argentina (05 Civ. 0177) Legnaro et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 0178) NML Capital Ltd. v. Republic of Argentina (05 Civ. 2434) Martinez et al. v. Republic of Argentina (05 Civ. 2521) Ferri et al. v. Republic of Argentina (05 Civ. 2943) Rigueiro et al. v. Republic of Argentina (05 Civ. 3089) Sauco et al. v. Republic of Argentina (05 Civ. 3955) Capital Ventures International v. Republic of Argentina (05 Civ. 4085) Bettoni et al. v. Republic of Argentina (05 Civ. 4299) Fedecostante et al. v. Republic of Argentina (05 Civ. 4466) Meridian Investments & Business Corp. v. Republic of Argentina (05 Civ. 5197) Lisi et al. v. Republic of Argentina (05 Civ. 6002) Rossini et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 6200) Klein et al. v. Republic of Argentina (05 Civ. 6599) Lovati v. Republic of Argentina (05 Civ. 8195) Botti et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 8687) GMO Emerging Country Debt LP v. Republic of Argentina (05 Civ. 10380) GMO Emerging Country Debt Investment Fund PLC v. Republic of Argentina (05 Civ. 10382) GMO Emerging Country Debt Fund v. Republic of Argentina (05 Civ. 10383) Pasquali et al. v. Republic of Argentina (05 Civ. 10636) Capital Ventures International v. Republic of Argentina (06 Civ. 0207) Bolland et al. v. Republic of Argentina (06 Civ. 3196) Amoroso et al. v. Republic of Argentina (06 Civ. 3197) Bliway International S.A. v. Republic of

Argentina (06 Civ. 3198) Schwald et al. v. Republic of Argentina (06 Civ. 6032) NML Capital Ltd. v. Republic of Argentina (06 Civ. 6466) Teachers Insurance and Annuity Association of America v. Republic of Argentina (06 Civ. 6221) Ivelo Holding Corp. v. Republic of Argentina (06 Civ. 7100) Tadayon v. Republic of Argentina (06 Civ. 14299) Beyer et al. v. Republic of Argentina (07 Civ. 0098) Palladini et al. v. Republic of Argentina (07 Civ. 0689) Catto et al. v. Republic of Argentina (07 Civ. 0937) NML Capital Ltd. v. Republic of Argentina (07 Civ.1910) Dolcetti et al. v. Republic of Argentina (07 Civ. 2607) NML Capital Ltd. v. Republic of Argentina (07 Civ. 2690) Blue Angel Capital I LLC v. Republic of Argentina (07 Civ. 2693) Baccanelli v. Republic of Argentina (07 Civ. 2788) Baccanelli v. Republic of Argentina (07 Civ. 3851) Andrarex Ltd. v. Republic of Argentina (07 Civ. 5593) Borgra et al. v. Republic of Argentina (07 Civ. 5807) NML Capital Ltd. v. Republic of Argentina (07 Civ. 6563) Milanesi et al. v. Republic of Argentina (07 Civ. 7248) Heeb et al. v. Republic of Argentina (07 Civ. 10656) HWB Victoria Strategies Portfolio, et al. v. Republic of Argentina (07 Civ. 10657) Aurelius Capital Partners, LP et al. v. Republic of Argentina (07 Civ. 11327) HWB Victoria Strategies Portfolio et al. v. Republic of Argentina (07 Civ. 11382) Erb et al. v. Republic of Argentina (07 Civ. 11495) Zylberberg Fein LLC v. Republic of Argentina (07 Civ. 11496) U.V.A. Vaduz et al. v. Republic of Argentina (07 Civ. 11497) Amber Reed Corp. et al., v. Republic of Argentina (08 Civ. 0440) NML Capital Ltd. v. Republic of Argentina (08 Civ. 2541) NML Capital Ltd. v. Republic of Argentina (08 Civ. 3302) Etcheto et al. v. Republic of Argentina (08 Civ. 4902) Hagemann v. Republic of Argentina (08 Civ. 5436)

Brandes et al. v. Republic of Argentina (08 Civ. 6625)
NML Capital Ltd. v. Republic of Argentina (08 Civ. 6978).

AMENDED OPINION

THOMAS P. GRIESA, District Judge.

Introduction

This opinion deals with the latest stage of the litigation arising out of the massive default in 2001 by the Republic of Argentina in connection with its bonds. The main difficulty in the numerous lawsuits filed in this court relates to how the plaintiffs can recover on judgments which had been entered and which are likely to be entered. The plaintiffs in 72 cases are now seeking to reach assets, believed to be on deposit in New York City, which belong to certain public and private Argentine pension funds. The current applications to the court were precipitated by legislation, which was then being proposed that would nationalize the private pension funds. The legislation would bring the assets of these funds into what plaintiffs claim to be a branch of the Argentine Government. The proposed legislation has now been enacted into law, as will be later described.

The court has determined that plaintiffs have made a sufficient showing that the assets involved in the present applications are subject to attachment and execution, and have further made a sufficient showing that the transfer of these assets, particu-

larly transfer out of the United States, should be restrained.

Procedural History

On October 29, 2008 the court signed an Order to Show Cause in three cases against the Republic of Argentina based on defaulted bonds. Two of these cases are brought by Aurelius Capital Partners (07 Civ. 2715 and 07 Civ. 11327) and the third case is brought by Blue Angel Capital (07 Civ. 2693). These cases will hereafter be referred to as "the Aurelius cases." The October 29 Order to Show Cause set down for hearing a motion to authorize the U.S. Marshals Service to serve a Writ of Execution covering property in New York belonging to an Argentine entity known as Administracion Nacional de Seguridad Social ("ANSES"), and also belonging to ten Argentine pension funds (Fondo de Jubilaciones y Pensiones, hereafter collectively "FJP Funds" or "FJPs"). The motion also seeks court approval for the issuance of Restraining Notices dealing with the properties referred to above. The Order to Show Cause also provided that, pending a hearing on the main motion, plaintiffs were authorized to deliver the Writs of Execution to the Marshals Service, although the Marshals Service was directed to defer serving the Writs of Execution or levying upon any property until further order of the court. Plaintiffs were authorized in the Order to Show Cause to make immediate service of the Restraining Notices, the purpose being to prevent removal of any of the subject property from the United States. Plaintiffs in these cases filed with the Order to Show Cause a Declaration of Barry R. Ostrager and a Memorandum

of Law, both dated October 29. The Order to Show Cause was originally returnable November 6, but was adjourned to November 14.

Six additional Orders to Show Cause covering 58 cases were signed on November 5, November 6, November 7, and November 12. With the exception noted below, these contained essentially the same provisions as were contained in the Aurelius orders, and were returnable November 14. An additional Order to Show Cause with the same provisions was signed on November 19, returnable on November 25. All but one of these orders were in cases where judgments have been entered.

In seven of the 58 cases judgments had not been entered, and one of the November 6 Orders to Show Cause was for attachments in these seven cases, together with restraints preventing removal of property out of the United States.

In ten additional cases a somewhat different procedure has been used, although the objective is the same—that is, to prevent the transfer of assets belonging to ANSES and the FJPs out of the country pending further order of the court.

In two of these cases-03 Civ. 8845 (brought by NML Capital) and 03 Civ. 2507 (brought by EM) —judgments have been obtained. In these cases the plaintiffs requested the court to sign a "Restraining Order" authorizing them to serve restraining notices with respect to the properties referred to earlier in this opinion. The court signed this Restraining Order on October 31. Among other things, it directed that plaintiffs should move within 10 days after the levy to confirm the Restraining Order.

In the remaining eight cases (all brought by NML Capital), judgments have not been obtained. In these

cases NML Capital submitted an Order of Attachment, which the court signed on October 31. The cases are:

05 Civ. 2434

06 Civ. 6466

07 Civ.1910

07 Civ. 2690

07 Civ. 6563

08 Civ. 2451

08 Civ. 3302

08 Civ. 6978

The Order of Attachment directed the Marshals Service to serve the Order of Attachment with respect to the property referred to earlier in this opinion, but to refrain from taking property into custody pending further order of the court. NML Capital was directed to move within 10 days after the levy to confirm the Order of Attachment.

On November 7 the court signed a Modified Restraining Order for NML Capital and EM and also signed a Modified Order of Attachment in the NML Capital cases. The modifications provided that the processes were intended to restrain the transfer of ANSES and FJP property outside of the United States and were not intended to prevent or restrain day-to-day investment management. The Modified Restraining Order omitted the provision about a motion to confirm, which was retained only in the Modified Order of Attachment.

NML Capital moved to confirm the attachment order by Notice of Motion which was dated Novem-

ber 12 and which was served on November 13. The motion was returnable on November 14. The motion was supported by Declarations of Martin Esteban Paolantonio and Suzanne M. Grosso, both dated November 12, and by a Memorandum of Law of the same date.

On November 12 the Republic of Argentina filed a motion to vacate the restraining orders and writs of execution in the Aurelius cases. This motion was accompanied by the declaration of Adrian Esteban Cosentino dated November 11 and a Memorandum of Law of the same date.

ANSES, although it is not a party to any of these actions, filed several declarations and a Memorandum of Law, all dated November 11. The various FJP Funds were represented by two different law firms, each of which filed a Memorandum of Law dated November 11. They also filed several declarations.

On November 14, counsel for the Republic of Argentina sent the court a letter requesting that the Republic's submissions in connection with the Aurelius cases be considered by the court in connection with all 71 cases then involved in the various applications. The list of these 71 cases, attached to the letter, included not only those which followed the format of the Aurelius Orders to Show Cause, but also the NML Capital and EM cases. In other words, the Republic made no separate, specific response to the Motion for Confirmation submitted by NML Capital and the submissions in support of the latter motion.

On November 13 and 14, counsel for ANSES and the FJPs submitted a number of letters to the court asking that their submissions in connection with the Aurelius cases should be considered in connection

with all cases. ANSES and the FJPs, like the Republic of Argentina, did not submit any further memorandum of law or declarations in response to the NML Capital and EM Motion for Confirmation. However, in a letter dated November 14, counsel for ANSES did address a brief comment to the Paolantonio declaration, which had been submitted by NML Capital and EM.

Plaintiffs in the Aurelius cases submitted a Reply Memorandum of Law dated November 13.

A hearing was held on November 14. It appeared at that time that there were factual issues deserving development by way of discovery, and the court urged the greatest promptness in pursuing such discovery. However, subsequent correspondence has indicated that the time required for discovery is greater than the court hoped. Accordingly, the court held a telephone conference with the attorneys on November 25, and advised them that the court feels it necessary in this unusual case to issue an opinion promptly, going as far as possible in dealing with the issues on the present record.

The Issues

The lawsuits before the court are, of course, against the Republic of Argentina. A few of them also name the Province of Buenos Aires, but it is the claims against the Republic which are now the concern of the plaintiffs and the court.

The forms of process described earlier in this opinion are directed to assets of ANSES and the FJP Funds. At the time the various orders were signed, the legislation designed to move the assets of the FJP Funds into ANSES had been proposed by the

President of Argentina and was proceeding through the Argentine Congress. It was passed by the Argentina House of Representatives on November 7 and by the Senate on November 20. Then there was a hiatus before the final steps were taken for the legislation to become law. The needed final steps were signing of the legislation by the President and publication in the Official Gazette. During this hiatus the court embarked upon the preparation of the present opinion. However, on December 9 the President signed the legislation and it was published in the Official Gazette. The effect of the new law is to accomplish what plaintiffs forecast would happen-*i.e.*, the assets of the FJP Funds are transferred to the public pension fund entity, ANSES.

There are $200 million of the FJP Funds in New York, mainly deposited in investment accounts. ANSES has represented that, prior to the transfer under the new law, it maintained no property in New York. Now, the $200 million will be transferred from the FJP Funds to ANSES. Presumably, this means that the issues about enforcement of the court orders will now be issues about whether there can be attachments or executions as to ANSES, rather than the FJP Funds.

Despite what has just been said, this opinion deals at some length with the FJPs. Since the $200 million was in the hands of the FJPs at the time the orders were signed, it is necessary to determine whether those orders as to the FJPs were valid at the time. Also, the history of the relationship between the Argentine Government and the FJPs is relevant to show a pattern of conduct by the Government in misusing pension funds.

Facts

I. *Before the New Legislation*

A. *The Pension System As It Was Supposed To Be*

The Argentine Government is required by the Argentine constitution to provide "the benefits of social security" through "compulsory social insurance" administered by "national or provincial entities with financial and economic autonomy." Const. Arg. art. 14 bis. The Argentine pension system has gone through different forms. Apparently at one time in the past there was considerable criticism of the fact that the Argentine Government was misusing funds dedicated to supporting pension payments, and was actually using such funds for other Governmental purposes. This led to the establishment of a private pension system known as the "Capitalization System." Under the Capitalization System, workers made contributions to accounts in investment funds known as FJPs, which were administered by private corporations known as AFJPs.

However, a public pension system remained, known as the "Distribution System." Under this system benefits were provided based on payroll deductions and taxes. The public system was administered by ANSES. According to the decree establishing ANSES, it is a "decentralized entity" that operates under "the jurisdiction of the Ministry of Labor and Social Security." Decree No. 2741/1991, Dec. 26, 1991, art. 1. This decree provides that ANSES is to be headed by an Executive Director appointed by the Ministry of Labor and Social Security and that it has the power to manage its own administration and

finance, independent of the National Treasury. *Id.* art. 3. Under Argentine law, ANSES can enter into contracts, sue and be sued, and acquire assets in its own name. Argentine law also provides that ANSES assets cannot be attached and can only be used for payments to beneficiaries.

Until 2007 there apparently was no attempt to "fund" the public system pensions, in the sense of establishing a pool of capital assets for that purpose. However, in 2007 the Argentine Government created what is known as the "Guarantee Fund." Decree No. 897/2007, July 12, 2007, art. 3. The Guarantee Fund is funded by the assets of workers who moved from the private pension system to the public system, as well as ANSES budget surpluses and investment returns. The decree establishing the Guarantee Fund authorizes ANSES to invest its assets in foreign and domestic securities and interest-bearing accounts. *Id.* art. 4. The Guarantee Fund is managed by an "Investment Management Committee," which is composed of the ANSES Executive Director, the Secretary of Treasury of the Ministry of Economy and Production, and the Secretary of Finance of the Ministry of Economy and Production. *Id.* art. 1. Investments are to be made to meet criteria of "safety and profitability" as defined by the Investment Management Committee. *Id.* art. 8.

It was earlier stated that the private pension system was established at least in part to protect against misuse of public pension funds by the Argentine Government. Accordingly, there were various Argentine legal provisions having the obvious purpose of protecting the private funds-the FJPs-from misuse. Each FJP was administered by an AFJP, a corporation whose sole function was to administer

a "retirements and pensions fund" and make "payments and benefits pursuant to" the pension law. Law No. 24,241, Oct. 13, 1993, art. 59. Law No. 24,241 is often referred to as the "Pension Laws." Funds paid into an FJP were maintained in individual accounts, separate from the assets of the AFJP itself. The law provided that these assets could be used only to generate social security benefits, did not belong to the AFJP, and were not subject to attachment. Law No. 24, 241, art. 82.

Article 74 of Law No. 24,241 established broad investment guidelines for FJP assets and set out which types of investments are authorized or permitted. Assets were to be invested "in accordance with the criteria of acceptable safety and profitability." Apparently the actual investing was done by the AFJPs.

The AFJPs were supervised by the Superintendency of Retirement and Pension Fund Administrators, "an independent entity with functional and financial autonomy under the jurisdiction of the Ministry of Labor and Social Security." Law No. 24,241, art. 117.

B. *Misuse of the Pension System by the Government*

The information contained in this section of the opinion comes largely from the submissions of NML Capital and EM dated November 12, and those of the Aurelius plaintiffs dated November 13.

There has been no response from the Republic, ANSES, or the AFJPs, to plaintiffs' submissions of November 12 and 13, except for a brief conclusory paragraph in the letter from counsel for ANSES dated November 14. As noted earlier in this opinion,

the letter from counsel for the Republic dated November 14 stated that the Republic would rest on its earlier submissions. Those earlier submissions did not, of course, respond to plaintiff's memoranda and declarations dated November 12 and 13.

This inevitably means that the plaintiffs' submissions of November 12 and 13 are not refuted on the record now before the court.[1]

Plaintiffs do not dispute the basic facts regarding the structure of ANSES, the FJPs and the AFJPs, or the existence of restrictions in Argentine law on the use of ANSES and FJP assets. However, plaintiffs contend that the structures and legal restrictions have been either disregarded or manipulated by the Argentine Government so that the Government has in fact used ANSES and the FJPs virtually at will to provide funds for non-pension Governmental purposes.

The device for this has mainly been for the Government to cause pension fund assets to be "invested" in debt instruments issued by the Republic. It should be noted, before going further, that anyone who has observed the years of litigation in this court about the huge Argentine debt default of 2001 (including the resistance in every possible way to avoid paying lawful judgments on this debt) can only conclude that any idea that such debt meets a test of "acceptable safety" is a complete departure from reality. Beyond this, the record in the present motions strongly indicates that the use of pension funds to purchase Argentine debt had, at least in

[1] Although the return date of the various motions was November 14 and a hearing was held on that date, no ruling was made on that date and the issues were left open for discovery. The court did not set a deadline or limit on briefing.

large part, a far different purpose than making safe and profitable investments to benefit the pension funds. Such purpose was to effectively appropriate funds for non-pension governmental uses.

Article 74 of the pension law originally provided that only 50% of the total assets of an FJP could be used to buy Argentine public debt securities. However, in November 2001, shortly before the debt default, the Government issued Emergency Decree 1387/2001 to amend Article 74 so as to provide that 100% of the assets of an FJP could be invested in Argentine public debt securities as long as there was collateral such as tax revenues. This change was not made by legislation, but by decree issued by the Executive.

Shortly after the above decree the Government issued Emergency Decree 1572/2001, which mandated that the AFJPs invest approximately $2 billion-a substantial portion of the total assets-in Republic bonds maturing in 120 days. All these bonds were defaulted 30 days after their issuance. There are two basic facts about this incident. The decision that such an investment should be made did not come from the AFJPs but from the Government. Moreover, the purpose was not to have FJP assets invested safely and profitably, but to take money for non-pension uses by the Government.

Pension fund managers were given substantial protection against the risks of investing in Republic debt. The AFJPs were generally required to write off defaulted securities on their books. However, Argentina's public debt securities were exempted from this requirement. *See* Superintendency Instruction No. 22/2003. Thus, AFJP managers who invested

in the public debt were permitted to disguise actual losses caused by defaults.

The Government has been able to obtain increased financing from FJP assets by raising the amount which may be invested in Argentine public securities, mainly debt, but also by taking steps to reduce the amount of other permissible investments. For instance, in October 2007 the AFJPs were required to repatriate almost all of their investments in Mercosur countries (mainly Brazil), by reducing the percentage that could be invested in such countries to 2% of total assets. In October 2008 the amount was reduced to zero percent.

The percentage of FJP assets invested in Argentine Government securities, including public debt, has been very large, as shown by the following table. This has been true even after 2001, when the huge default occurred.

Percent of Assets of FJPs in Argentine Government Securities (including Public Debt)

1998	49.99
1999	52.30
2000	54.62
2001	67.97
2002	76.69
2003	68.15
2004	61.17
2005	56.95
2006	53.61
2007	50.60

As of October 15, 2008 FJPs held $26.3 billion in assets, 55% of which was invested in Government debt.

Turning back to ANSES, the Guarantee Fund of that entity has only recently been established, and there is not, as in the case of the FJPs, a record of several years with regard to investments. However, certain information is available.

An article in La Nacion of June 3, 2008 was entitled "The Justification For Financing The Government With Funds Of ANSES. The Organization Plans To Buy More Bonds." The article quoted Amado Boudou, executive director of ANSES, as defending the official policy of allocating funds from the Guarantee Fund to finance the public sector. Boudou stated that Guarantee Fund assets would be used to finance projects that are labor intensive so as to create jobs, which in turn would help sustain the benefits program. The article stated that ANSES currently had a Treasury note for $2.75 billion that would mature next April. There was another note for $500 million that would mature in the middle of next March.[2] The first transaction involved an investment "already extended past its original maturity." Both were ordered under resolutions of the Ministries of the Treasury and of Finance, which are part of the Ministry of the Economy. The article stated that the Ministry of the Economy expected "greater investments among Government bodies due to problems of obtaining funds to pay debt in the investment market."

The decree establishing the Guarantee Fund of ANSES specified that there would be a detailed

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[2] The reference to these amounts in dollars is apparently erroneous. It appears that these were peso amounts.

annual report regarding all actions taken in the management of the Guarantee Fund. Decree 897/2007 art. 8(d). However, there is no evidence that such a report has been prepared as of the present time. Plaintiffs contend that there is almost no publicly available information regarding the investments that have actually been made out of the Guarantee Fund. This contention is not denied.

An article in La Nacion dated September 11, 2008 stated that the Government this year has resorted, to an unprecedented extent, to the funds in public institutions, especially ANSES, "to close its fiscal accounts." The day before the article the Official Gazette announced the placement of a new Treasury bill in ANSES, which was the third transaction of this type during the year, and also the largest: 1.4 billion pesos. This raised the Government's liability to ANSES to 5.95 billion pesos, almost 50% more than what it was at the end of 2007. The article confirmed that up to 65% of the assets of the Guarantee Fund of ANSES, which serves to guarantee the future payment of retirements, may be used in "public credit transactions." La Nacion had asked ANSES about the actual amount of assets in the Guarantee Fund, but had received no response. The article also noted the ability of the Government to simply replace a maturing Treasury bill with another when the first matures. An example was the Treasury bill placed with ANSES for 2.75 billion pesos in April 2008 for a one-year term, replacing the bill issued in December which matured in April.

II. *The New Legislation*

On October 21, 2008, Argentina's president, Christina Fernandez de Kirchner, proposed a new

law, entitled "Integrated Argentine Pension System." It was passed by the Argentine House of Representatives on November 7 and by the Senate on November 20. It went into effect on December 9, upon signature by the President and publication in the Official Gazette.

The new law terminates the existing dual-regime pension system and requires the transfer of all FJP assets managed by AFJPs under the private system into the public system. Specifically, these assets would be lodged in the Guarantee Fund of ANSES. Pensioners will no longer have property rights in private funds, but are to receive "defined benefits" upon retirement. The purpose as expressed in the preamble to the bill is that pension funds should not be subject to the swings of financial markets.

The new law carries over essentially the same provision contained in the 2007 ANSES law to the effect that the funds of ANSES shall only be used to make benefit payments. Law 26,222 art. 15. Article 8 of the Integrated Argentina Pension System law provides that the funds in the integrated system "may only be used for payment of benefits under the Integrated Argentina Pension System."

It has already been seen that the safeguard written into the ANSES legislation did not prevent ANSES funds from being used at the will of the Government for the benefit of the Government.

It is widely believed by knowledgeable commentators that the actual purpose of the new legislation is to allow the Government more direct access to the FJP funds now existing and to the larger pool of funds to be accumulated in the future in the integrated pension system. Indeed, the provision in the new law about investment of fund assets is remark-

able in its laxity. Article 8 provides that "fund assets shall be invested according to the criteria of adequate security and profitability, and *shall contribute to the sustainable development of the real economy*, for the purpose of ensuring a virtuous circle between economic growth and an increase in social security funding and assets" (emphasis added).

In a press release of November 11, 2008, Amado Boudou, head of ANSES, said that he, *together with the Treasury and Finance secretaries*, would decide how the ANSES funds would be invested following nationalization of the private funds.

Roberto Lavagna, Argentina's former Minister of Economy, was asked in an interview on October 31, 2008 how ANSES was currently using the retirees' money. He answered that it was for "financing the budget. . . . It's all invested in public bonds." He was further asked about the possibility that the same thing would happen under the new law. He answered as follows:

> The bill introduced by the executive branch has no guarantees. The combination of a common pot and superpowers means that we won't know where the money is going. They say things will go smoothly. But, I also remember a speech by Peron in 1974 where he said: "The retirees' money isn't there." Where did it go? To the fiscal deficit.

A Dow Jones item of October 21, 2008 noted that the Republic's current financial options are dwindling and that some economists see the pension fund takeover as a last-ditch move by the Government to get its hands on cash. Dow Jones quoted a Goldman Sachs estimate that the takeover would

cover about one-third of the Government's borrowing needs for the years 2009 to 2011.

An article in The Times (London) of October 23, 2008, stated that analysts believe that the new legislation is an attempt to seize assets and avoid Argentina's second default this decade. According to the article,

> The last time that the Government sought to tap workers' savings to meet debt payments was in 2001, just before it stopped servicing $58 billion of obligations.

A Wall Street Journal article of October 28, 2008 stated that the view of economists is that the takeover is aimed at replenishing the Government coffers ahead of midterm elections and ahead of sizeable debt payments coming due.

An item in La Nacion of November 7, 2008 stated that for Mr. and Mrs. Kirchner "it's like a dream." La Nacion further remarked that the Government coffers will be increased by almost 100,000 million pesos thanks to the contribution which ANSES is going to receive from the private pension funds.

On December 5, President Kirchner announced a plan to assist the Argentine economy by encouraging production, investment, employment, and consumption. Of the funds needed, 7.5 billion pesos would come from fixed-term placements that the AFJPs had and that now will be managed by ANSES.

A further point should be noted with respect to the concern voiced by plaintiffs that assets of the various pension funds are likely to be removed from the United States and transferred to Argentina. A Dow Jones item of October 28, 2008 quotes Amado Boudou as stating that foreign investments currently

held by private pension funds would be sold and repatriated "to fulfill domestic finance objectives under a Government plan to nationalize the private funds."

III. *Assets in New York*

Officials from two of the AFJPs stated in their declarations that the funds they administer lodged in New York are primarily used for investments, although they are occasionally reallocated between cash and securities in order to benefit from market fluctuations. At the hearing of November 14, the attorney for certain of the AFJPs stated that about $200 million is currently frozen in accounts in New York. When asked by the court whether these funds are in investment accounts or cash accounts, the attorney replied that they are mainly in investment accounts, although he did not know the details of such accounts. The assets actually belong to the FJPs, although they are administered by the AFJPs.

ANSES has filed a declaration stating that it does not have or hold any property in the United States, including any bank account. Whether this declaration is intended to exclude investment accounts is not entirely clear. Of course, now that the FJP assets are transferred to ANSES pursuant to the new legislation, ANSES will have ownership of the investment accounts in New York now belonging to the FJPs.

Discussion

The Status of ANSES

In connection with the issuance of the Argentine bonds, the Republic agreed to a broad waiver of

sovereign immunity. This waiver permitted the various lawsuits against the Republic in this court, based upon the defaulted bonds. However, despite this broad waiver of immunity, when it comes to attachment of assets or execution on assets, there are limitations in the Foreign Sovereign Immunities Act ("FSIA") which must be observed. The assets of a foreign state can be subject to such processes only if such assets are "used for a commercial activity in the United States." 28 U.S.C. §§ 1610(a) and (d). *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 468, 485 n. 22 (2d Cir.2007). The statute obviously recognizes that even a waiver of sovereign immunity must have its limits. For instance, there can be no attachment or execution as to an embassy or a visiting naval vessel.

The FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." § 1603(a). However, with respect to attachment and execution there are somewhat different provisions regarding what is referred to as a "foreign state" and what is referred to as "an agency or instrumentality of a foreign state." § 1610. There can be attachment or execution against the "foreign state" if there has been a waiver of immunity applicable to the state. §§ 1610(a) and (d). And there has in fact been such a waiver of immunity by the Republic of Argentina. As to an "agency or instrumentality of a foreign state" there must be a waiver of immunity specifically as to such agency or instrumentality, or another reason why immunity does not apply specifically to the agency or instrumentality. § 1610(b). There has been no such waiver of immunity as to ANSES.

Plaintiffs contend, however, that ANSES is part of the foreign state of Argentina, that the immunity conferred by the Republic of Argentina embraces ANSES, and that property of ANSES can be attached and executed upon as belonging to the Republic. Plaintiffs deny that ANSES is an agency or instrumentality of the Republic, within the meaning of the FSIA, and deny that § 1610(b) has any application to ANSES.

The Republic and ANSES assert that ANSES is not part of the Republic for the purpose of dealing with the issues here presented. They claim that ANSES is a separate instrumentality over which the court has no jurisdiction, and they deny that jurisdiction over the Republic, and the immunity granted by the Republic, confers any jurisdiction or confers any basis under the FSIA to attach or execute upon the property of ANSES.

Plaintiffs do not contend that the FJP Funds or their managers, the AFJPs, are part of the Republic of Argentina. They contend, however, that the Republic has rights to the FJP Funds which can be attached and executed upon pursuant to New York law. This issue will be dealt with in a subsequent section of the opinion.

With regard to the issue of whether the process against ANSES is valid, the Republic and ANSES basically rest their position on the decision of the Supreme Court in *First National City Bank v. Bancec*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). The first thing to note, however, is that *Bancec* was not a case under the FSIA. The issue in that case was whether a Cuban bank, which was an "instrumentality" of the Cuban government, could be held responsible for certain liabilities of the Cuban

government. The Court held the bank liable, in a factual setting having nothing whatever to do with the present case involving the Republic of Argentina. The Court stated that the case was being decided under "principles of equity common to international law and federal common law." *Id.* at 613. The Court stated that the FSIA did not control, but the Court would be "guided by the policies articulated by Congress in enacting the FSIA." *Id.* at 621.

The Court found, in the legislative history of the FSIA, an intention of Congress that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status ." *Id.* at 627-28. However, this presumption may be overcome in certain circumstances, and the Court found that it was indeed overcome in *Bancec.*

In the course of its discussion, the Court described characteristics of a "typical government instrumentality, if one can be said to exist." *Id.* at 624. One such characteristic is that the instrumentality "is primarily responsible for its own finances" and is "run as a distinct economic enterprise." *Id.*

Before discussing *Bancec* further, it is necessary to describe *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir.2006), which is the authoritative ruling of the Second Circuit on the meaning of "agency or instrumentality" under the FSIA. It is surely clear that the present case deals with matters specifically covered by the FSIA—*i.e.*, whether there can be attachment or execution as to the property of a foreign sovereign and an entity connected with that sovereign. The Second Circuit in *Garb* concluded that when Congress referred to agencies or instrumentalities in the FSIA, it was intending to target "public commercial enterprises." *Id.* at 595. The

issue as to whether a foreign entity is a "separate legal person"—*i.e.*, separate from a foreign state-depends on whether the "core functions of the foreign entity are predominantly governmental or commercial." *Id.* at 591, 593-95. The court disapproved the idea of relying mechanically on the legal status of the foreign entity, or giving dispositive weight to whether the foreign entity could sue or be sued in its own name, contract in its own name, or hold property in its name. *Id.* at 595. Rather, the issue is, what function does the entity perform?

The Second Circuit cited with approval cases in the D.C. Circuit and the Fifth Circuit as to the governmental versus commercial distinction. *Transaero, Inc. v. La Fuerza Aerea Bolivania*, 30 F.3d 148 (D.C.Cir.1994); *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir.2001). The Second Circuit found *Transaero* particularly instructive because the court in that case had analyzed Congress's use of the phrase "agency or instrumentality of a foreign state" in light of a "rich background of federal and international law." *Garb*, at 591.

It is now necessary to apply the *Bancec* and *Garb* decisions to the present case. The Second Circuit has recognized that the *Bancec* decision may be of little help in deciding FSIA cases. *Compagnie Noga d'Importation et d'Exportation v. Russian Federation*, 361 F.3d 676, 685 (2d Cir.2004). In any event, however, the presumption of independence, described in *Bancec*, has surely been overcome in the present case. The *Bancec* decision mentioned that a typical independent instrumentality is primarily responsible for its own financing and is run as a distinct economic enterprise. The evidence before the court in the present case leaves no doubt about the fact that

the Argentine Government dominates the finances of ANSES and uses ANSES at will in order to obtain funds for non-pension uses by the Government.

With regard to *Garb*, there is no difficulty in concluding that ANSES performs a governmental function rather than a commercial function. Indeed, ANSES admits, as it must, that the provision of social security is a governmental function. The only argument of ANSES to avoid the *Garb* ruling is to assert that the test is whether the function *must* be governmental. ANSES contends that social security *can* be provided by an entity outside the government, as evidenced by the FJPs. But the argument of ANSES finds no support in *Garb* or in similar decisions. The issue is whether ANSES does in fact perform a governmental function, and it surely does.

The court holds that ANSES is a political subdivision of the Republic of Argentina, that it is subject to the jurisdiction of this court because the court has jurisdiction over the Republic, and that the assets of ANSES are subject to attachment and execution to the same degree as are the assets of the Republic.

Status of FJPs and AFJPs

At the time of the orders issued by the court, the FJPs and AFJPs were entities separate from the Government of Argentina. To the extent that they still exist, even after transfer of the FJP assets to ANSES under the new law, they are still separate entities. Nor are they agencies or instrumentalities of the Republic within the meaning of the FSIA. The FJPs were established as private pension funds and the AFJPs were established to administer these pri-

vate pension funds. The court does not construe the arguments of plaintiffs to present anything different.

The basis for attaching, executing upon, or restraining assets of the FJPs is that the Republic has an interest in such assets which can make such assets subject to attachment, execution, or restraint. The authority for such process lies in the fact that the Republic's interest in these assets is subject to attachment under the FSIA (on the basis of explanations throughout this opinion) and is subject to process under New York law (as will be explained hereafter).

The AFJPs argue that, in order for plaintiffs to prevail in connection with the FJP assets, they must overcome the *Bancec* presumption that the FJPs are instrumentalities separate from the Republic of Argentina. This argument is entirely misplaced. No one is questioning the status of the FJPs, and of the AFJPs, as separate entities.

Commercial Activity Requirement

In order to justify attaching or executing on property of a foreign sovereign in the United States, plaintiffs must establish that the property is "used for a commercial activity in the United States." 28 U.S.C. §§ 1610(a) and (d).

As described earlier, the evidence shows that the FJPs have about $200 million of assets in New York, mainly in investment accounts, for investment in securities. ANSES asserts that it has no property in the United States. Presumably this denial means that it has no investment accounts, although the matter is not entirely clear.

In any event, both the Republic and ANSES argue that, even if all other conditions for attachment and

execution are met for the investment accounts, such process is barred because the property is not used for commercial activity. It should be noted that the Memoranda of Law filed on behalf of the AFJPs pose a variety of objections to the orders that have been entered, but do not discuss the commercial activity issue.

Plaintiffs argue that the commercial activity requirement is met because investment in securities is commercial activity and that this is true even if the assets might *ultimately* be used for some governmental activity, including payment of pensions in Argentina. The Republic and ANSES contend that the ultimate governmental usage controls and that the funds in the United States are devoted to funding pensions. Of course, while the FJPs are private pension funds, they are not part of the Government. Nevertheless the payment of pensions is something that is required under the Argentine Constitution and under Argentine law, and this is not commercial activity.

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The basic inquiry in determining whether an activity is "commercial" is "whether the activity is of the type an individual would customarily carry on for profit." *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir.1984). Thus, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial.' " *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The FSIA specifies that a court consider this question "by reference

to the nature of the course of conduct . . . , rather than by reference to its purpose." 28 U.S.C. § 1603(d).

Courts have recognized that sovereigns engage in commercial activity when they issue bonds or make contracts to purchase goods, even if the sovereign ultimately intends to use the proceeds of these activities for governmental purposes. *See Weltover*, 504 U .S. at 617 (issuance of bonds); *Texas Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 310 (2d Cir.1981) (purchase of goods). Similarly, the legislative history of the FSIA states that investing in securities is commercial activity. H.R.Rep. No. 94-1487, at 16 (1976) (investment in a security of an American corporation is included within the definition of commercial activity). By contrast, repaying debts to the International Monetary Fund, and, not surprisingly, conducting political assassination, are not commercial activities. *EM Ltd.*, 473 F.3d at 484; *De Letelier*, 748 F.2d at 797.

The Republic and ANSES urge the court to ignore *Weltover* and certain other cases relied on by plaintiffs, because they were decided under § 1605, dealing with jurisdictional immunity, and not under § 1610, dealing with attachments and executions. However, the essential phrase in both sections is "commercial activity." The definition section of the statute, in defining "commercial activity," does not provide any different definition for § 1605 versus § 1610. *See* § 1603(d). Courts have therefore applied decisions concerning immunity under § 1605 to construe the scope of "commercial activity" under § 1610. *E.g.*, *De Letelier*, 748 F.2d at 797.

The Republic and ANSES contend that the use of the funds at issue in the United States is analogous

to funds held by sovereigns in U.S. bank accounts for payment of diplomatic expenses. This is not an accurate analogy. There is no indication that the funds at issue in the present case have been subject to continuous deposits and withdrawals for the purpose of actually paying pension benefits or any other governmental expenses. If this were the case, the court would surely have been informed of it. The only reasonable conclusion from the present record is that the funds are being invested in the hope of profit in the manner that any investor would so invest.

The court must note that, while the actual current use of the funds for investment is a definite, known use, the "ultimate" use of the funds is a matter of doubt. The evidence described earlier in this opinion demonstrates that funds belonging to the FJPs and managed by the AFJPs might or might not be used for pensions. Such funds can be called upon at the will of the Government for "investment" in government securities, which in all probability is a form of appropriation for non-pension governmental uses.

The court concludes that any funds of the FJPs deposited in New York, and any funds of ANSES that may be deposited in New York, are used for commercial activity within the meaning of 28 U.S.C. §§ 1610(a) and (d).

New York Procedure

Under the Federal Rules of Civil Procedure, a federal court employs the attachment and execution procedures provided by the law of the state in which the court is located. *See* Fed.R.Civ.P. 64 (attachments); Fed.R.Civ.P. 69 (judgment executions). The

New York Civil Practice Law and Rules ("CPLR") must be looked to in the present case.

CPLR §§ 6201 *et. seq.* deal with pre-judgment attachments. CPLR § 5101 *et. seq.* deal with post-judgment remedies. The provision regarding property subject to attachment, § 6202(b), refers to the definition used for enforcement of a judgment in § 5201. The result is that property subject to attachment and property subject to execution are defined as:

> . . . any property which could be assigned or transferred, whether it consists of a present or future right or interest an whether or not it is vested. . . .

See § 5201(b).

The restraining notice, provided for in CPLR § 5222, is another post-judgment remedy, and clearly relates to property as defined in § 5201.

New York courts have recognized that a future, non-vested interest is attachable property under section 5201(b). In *ABKCO Industries, Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 674, 385 N.Y.S.2d 511, 350 N.E.2d 899 (1976), the New York Court of Appeals held that the plaintiff's contractual interest in a portion of the proceeds from a film project was attachable property, even though the defendant had not yet received any funds under the contract. Thus, a court may attach "contingent property interests," such as payments that a debtor expects to receive from a trust, even when the payments are in the discretion of the trustee. *Kates v. Marine Midland Bank, N/A*, 143 Misc.2d 721, 541 N.Y.S.2d 925, 928 (N.Y.Sup.Ct.1989). Moreover, even if the debtor's interest has no economic value at the time of the attachment, it can be attached as long as it "has

potential economic value to the creditor." *Supreme Merchandise Co. v. Chemical Bank*, 70 N.Y.2d 344, 349-50, 520 N.Y.S.2d 734, 514 N.E.2d 1358 (1987).

At the time the court signed the orders in the present proceeding, the Republic had property interests in the $200 million of FJP assets deposited in New York within the meaning of New York law. As shown earlier in this opinion, the Argentine Government had in effect exercised the power to "assign" and to "transfer" to itself very substantial portions of the assets of the FJPs for non-pension uses. Therefore the Republic had interests in the FJP assets subject to attachment, execution, and restraint under the provisions of the CPLR and the case law interpreting such provisions.

The Republic and the AFJPs argue that if a debtor's possession of assets depends on further action by the debtor, the assets are not attachable property. This argument rests on two lines of cases. *First*, courts have rejected attempts in divorce cases to attach a spouse's potential future payments under an employer retirement plan when, at the time of the attachment, the spouse "would be entitled to no payment from the trustees of the Plan." *Sochor v. Int'l Bus. Machs. Corp.*, 60 N.Y.2d 254, 259-60, 469 N.Y.S.2d 591, 457 N.E.2d 696 (1983); *accord Price v. Palagonia*, 212 A.D.2d 765, 623 N.Y.S.2d 269 (2d Dep't.1995). *Second*, in *Supreme Merchandise Co. v. Chemical Bank, supra*, at 351, 520 N.Y.S.2d 734, 514 N.E.2d 1358, the New York Court of Appeals rejected an attempt to attach an interest under a negotiable letter of credit because the "unique character" of letters of credit in facilitating international trade presents "policy reasons" for preventing their attachment. The court was concerned that allowing

attachment of obligations under letters of credit would cause the "diminution of confidence in the certainty and integrity of letters of credit in this jurisdiction." *Id.* at 353, 520 N.Y.S.2d 734, 514 N.E.2d 1358. *See also Diakan Love. S.A. v. Al-Haddad Bros. Enters.*, 584 F.Supp. 782, 785 (S.D.N.Y.1984) (basing its decision on the "special role and nature of the letter of credit").

Both sets of cases apply to narrow factual settings that are not relevant here. The pension plan cases stand for the unremarkable principle that if a debtor has no interest in property, there is no interest to attach. The policy concerns implicated by letters of credit do not apply to the attachment of investment accounts. Moreover, the New York Court of Appeals has held that "even claims that depend on further action by the debtor may constitute 'property.'" *Supreme Merchandise* at 351, 520 N.Y.S.2d 734, 514 N.E.2d 1358. At most, the Court of Appeals has suggested that courts should exercise caution when a debtor "retains the option to defeat [its] interest and render it worthless," since the debtor would be able to undermine the attachment under those circumstances. *Id.* at 350-51, 520 N.Y.S.2d 734, 514 N.E.2d 1358. The decisions do not bar the orders in this case.

The Republic of Argentina, ANSES and the AFJPs make an argument under CPLR § 5225(b). This provides that where there is post-judgment execution upon property in the possession or custody of the judgment debtor, there must be a special proceeding against the third party in order to obtain the turnover of the property. There is also an argument that there must be a special proceeding because plaintiffs are asserting alter ego theories. The short

answer to these contentions is that the current proceedings are not seeking a turnover, and plaintiffs are not relying on alter ego theories. Also, as can be seen from the rulings of the court in this opinion, the court has in no sense relied on the theory of alter ego.

As described earlier in this opinion, it appears that Argentine law provides that pension fund assets cannot be attached. But the pension fund protections, written into Argentine law, have been manipulated by the Government with the result that the Government has exercised virtually unrestricted latitude to channel pension fund assets into Government accounts for non-pension use. The Argentine prohibitions against attachment were obviously enacted with no reference whatever to a problem about attaching, executing upon, and restraining the *Government's* "interest" in the assets based on conduct by Government of the kind shown in this case. The Argentine prohibitions cannot be said to bar the forms of process being used in the present case.

To return to the question of whether the FJP assets can be attached, executed upon, or restrained, the status of the FJP assets is now changed under the new law, which became effective December 9. These assets are now the assets of ANSES. All further proceedings to carry out attachment and post-judgment remedies will be directed against ANSES. This puts the situation in a straightforward posture. ANSES is part of the Government of Argentina. The court has the direct authority to attach, execute upon, and restrain property in New York belonging to the Republic, which includes property of ANSES. This is true, provided that the requirements of the FSIA

are met, as they are, for reasons that have been explained.

Conclusion

The court holds that the various forms of process described in this opinion, which were authorized as to the FJP Funds located in New York and any ANSES property located in New York, were legally valid at the time they were ordered by the court and remain legally valid, for the reasons set forth in this opinion. The process as to FJP Funds remains in effect now that the assets of these funds are transferred to ANSES pursuant to the new law.

This holding is based on the record now before the court. It appears that more discovery will take place, resulting in further development of the facts. This may make additional rulings of the court necessary. However, the court deemed it essential to issue an opinion now on the basis of the present record, and it is doing so.

Plaintiffs are directed to submit, on notice, proposed orders specifically dealing with the various motions which have been made.[3]

SO ORDERED.

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[3] On November 24, 2008 the court signed *ex parte* orders regarding execution, attachment and restraint in the 10 cases brought by NML Capital and EM. These were directed to assets which would be transferred to ANSES when the new law became effective. The court is informed that, now that the new law is in effect, appropriate service of this process has been made. Although the present opinion may well have implications regarding the new NML Capital and EM proceedings, such proceedings are not before the court and are not covered by the ruling in the present opinion. Moreover, nothing in the present opinion is intended to deal in any way with questions of priority among the plaintiffs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

March 4, 2009
No. 07 Civ. 2715 (TPG)

AURELIUS CAPITAL PARTNERS, LP and
AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

—v.—

The REPUBLIC OF ARGENTINA,

Defendant.

Lightwater Corp. Ltd. v. Republic of Argentina (02 Civ. 3804) Old Castle Holdings, Ltd. v. Republic of Argentina (02 Civ. 3808) Allan Applestein TTEE FBO D.C.A. Grantor Trust, et al. v. Republic of Argentina (02 Civ. 4124) Etevob et al. v. Republic of Argentina & Province of Buenos Aires (03 Civ. 1680) EM Ltd. v. Republic of Argentina (03 Civ. 2507) Franceschi et al. v. Republic of Argentina (03 Civ. 4693) Mazzini et al. v. Republic of Argentina (03 Civ. 8120) NML Capital Ltd. v. Republic of Argentina (03 Civ. 8845) Denchu Investment Corp. v. Republic of Argentina (03 Civ. 9538) Prima et al. v. Republic of Argentina & Province of Buenos Aires (04 Civ. 1077) Mazoral S.A. v. Republic of Argentina (04 Civ. 3313) Morata et al. v. Republic of Argentina (04 Civ. 3314) Moldes et al.

v. Republic of Argentina & Province of Buenos Aires (04 Civ. 6137) Cilli et al. v. Republic of Argentina (04 Civ. 6594) Buczat et al. v. Republic of Argentina (04 Civ 7056) Rosa et al. v. Republic of Argentina (04 Civ. 7504) Consolini et al. v. Republic of Argentina (05 Civ. 0177) Legnaro et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 0178) NML Capital Ltd. v. Republic of Argentina (05 Civ. 2434) Martinez et al. v. Republic of Argentina (05 Civ. 2521) Ferri et al. v. Republic of Argentina (05 Civ. 2943) Rigueiro et al. v. Republic of Argentina (05 Civ. 3089) Sauco et al. v. Republic of Argentina (05 Civ. 3955) Capital Ventures International v. Republic of Argentina (05 Civ. 4085) Bettoni et al. v. Republic of Argentina (05 Civ. 4299) Fedecostante et al. v. Republic of Argentina (05 Civ. 4466) Meridian Investments & Business Corp. v. Republic of Argentina (05 Civ. 5197) Lisi et al. v. Republic of Argentina (05 Civ. 6002) Rossini et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 6200) Klein et al. v. Republic of Argentina (05 Civ. 6599) Lovati v. Republic of Argentina (05 Civ. 8195) Botti et al. v. Republic of Argentina & Province of Buenos Aires (05 Civ. 8687) GMO Emerging Country Debt LP v. Republic of Argentina (05 Civ. 10380) GMO Emerging Country Debt Investment Fund PLC v. Republic of Argentina (05 Civ. 10382) GMO Emerging Country Debt Fund v. Republic of Argentina (05 Civ. 10383) Pasquali et al. v. Republic of Argentina (05 Civ. 10636) Capital Ventures International v. Republic of Argentina (06 Civ. 0207) Bolland et al. v. Republic of Argentina (06 Civ. 3196) Amoroso et al. v. Republic of Argentina (06 Civ. 3197) Bliway International S.A. v. Republic of Argentina (06 Civ. 3198) Schwald et al. v. Republic of Argentina (06 Civ. 6032) NML Capital

Ltd. v. Republic of Argentina (06 Civ. 6466) Teachers Insurance and Annuity Association of America v. Republic of Argentina (06 Civ. 6221) Ivelo Holding Corp. v. Republic of Argentina (06 Civ. 7100) Tadayon v. Republic of Argentina (06 Civ. 14299) Beyer et al. v. Republic of Argentina (07 Civ. 0098) Palladini et al. v. Republic of Argentina (07 Civ. 0689) Catto et al. v. Republic of Argentina (07 Civ. 0937) NML Capital Ltd. v. Republic of Argentina (07 Civ.1910) Dolcetti et al. v. Republic of Argentina (07 Civ. 2607) NML Capital Ltd. v. Republic of Argentina (07 Civ. 2690) Blue Angel Capital I LLC v. Republic of Argentina (07 Civ. 2693) Baccanelli v. Republic of Argentina (07 Civ. 2788) Baccanelli v. Republic of Argentina (07 Civ. 3851) Andrarex Ltd. v. Republic of Argentina (07 Civ. 5593) Borgra et al. v. Republic of Argentina (07 Civ. 5807) NML Capital Ltd. v. Republic of Argentina (07 Civ. 6563) Milanesi et al. v. Republic of Argentina (07 Civ. 7248) Heeb et al. v. Republic of Argentina (07 Civ. 10656) HWB Victoria Strategies Portfolio, et al. v. Republic of Argentina (07 Civ. 10657) Aurelius Capital Partners, LP et al. v. Republic of Argentina (07 Civ. 11327) HWB Victoria Strategies Portfolio et al. v. Republic of Argentina (07 Civ. 11382) Erb et al. v. Republic of Argentina (07 Civ. 11495) Zylberberg Fein LLC v. Republic of Argentina (07 Civ. 11496) U.V.A. Vaduz et al. v. Republic of Argentina (07 Civ. 11497) Amber Reed Corp. et al., v. Republic of Argentina (08 Civ. 0440) NML Capital Ltd. v. Republic of Argentina (08 Civ. 2541) NML Capital Ltd. v. Republic of Argentina (08 Civ. 3302) Etcheto et al. v. Republic of Argentina (08 Civ. 4902) Hagemann v. Republic of Argentina (08 Civ. 5436) Brandes et al. v. Republic of Argentina (08 Civ. 6625) NML Capital Ltd. v. Republic of Argentina

(08 Civ. 6978) Teachers Insurance and Annuity Association of America v. Republic of Argentina (06 Civ. 6621)

ORDER

THOMAS P. GRIESA, District Judge.

This order is based on the opinion of the court dated December 11, 2008.

By Order to Show Cause submitted to the court on October 29, 2008, and signed by the court on that date, plaintiffs in three of the captioned cases (07 Civ. 2715, 07 Civ. 11327, and 07 Civ. 2693) moved to authorize the U.S. Marshals Service to serve Writs of Execution in order to enforce the judgments in these cases, covering property belonging to an Argentine entity known as the Administracion Nacional de Seguridad Social ("ANSES"), and also belonging to ten Argentine pension funds (Fondos de Jubilaciones y Pensiones, referred to as the "FJP Funds" or "FJPs"). These plaintiffs also moved to have the court approve the issuance of Restraining Notices dealing with the properties referred to above, the purpose of the proposed Restraining Notices being to prevent the removal of any of the subject property from the United States.

Eight additional Orders to Show Cause, covering 59 cases, were signed on November 5, November 6, November 7, November 12, and November 19, 2008. In connection with 52 of these cases, the plaintiffs moved for the same relief as was requested in the Order to Show Cause of October 29, 2008. Judgments had been entered in these 52 cases.

In the other seven of the 59 cases, judgments had not been entered, and the plaintiffs in these cases moved for orders of attachment, and also moved for restraints preventing the removal of the property from the United States.

The plaintiffs in ten additional cases made an application to the court dated October 31, 2008.

In two of these cases (03 Civ. 2507 and 03 Civ. 8845), judgments had been entered. The plaintiffs in these cases moved to have the court sign a Restraining Order restraining the transfer of the type of property referred to earlier in this Order. The plaintiffs also moved for an order authorizing the Marshals Service to levy upon such property in an amount sufficient to satisfy the judgments, although the proposed order would provide that the Marshals Service would refrain from taking such property into custody pending further order of the court. The court signed this order on October 31, 2008, conditioned on the obligation of the plaintiffs to move within ten days after any levy for confirmation of the order.

In the remaining eight of the ten cases, judgments had not been entered. The plaintiff in these cases, NML Capital, submitted an Order of Attachment, which the court signed on October 31, 2008. These cases are:

05 Civ. 2434

06 Civ. 6466

07 Civ.1910

07 Civ. 2690

07 Civ. 6563

08 Civ. 2451

08 Civ. 3302

08 Civ. 6978

The Order of Attachment directed the Marshals Service to serve the Order of Attachment with respect to the type of property referred to earlier in this Order, but to refrain from taking the property into custody pending further order of the court. NML Capital was directed to move within 10 days after the levy to confirm the Order of Attachment.

On November 7, 2008, the court signed a Modified Restraining Order in cases 03 Civ. 2507 and 03 Civ. 8845, and a Modified Order of Attachment in the other eight cases. The modifications provided that the processes were intended to restrain the transfer of ANSES and FJP property outside of the United States and were not intended to prevent or restrain day-to-day investment management. The Modified Restraining Order omitted the provision about a motion to confirm, which was retained only in the Modified Order of Attachment. Otherwise, the provisions of the orders of October 31, 2008 remained unchanged.

On November 12, 2008, NML Capital moved to confirm the Order of Attachment of October 31, 2008, as modified, and to compel expedited discovery. The motion was returnable on November 14, 2008. By motion dated November 12, 2008, and a letter dated November 14, 2008, the Republic of Argentina moved to vacate all restraining orders and writs of execution. By these submissions, the Republic not only moved to vacate any temporary relief granted to the plaintiffs pending a hearing on their main motions, but expressed the Republic's opposition to the main motions. The Republic also

opposed the motion of NML Capital to confirm its attachment.

Counsel for ANSES and the FJPs made various submissions opposing the applications made by the plaintiffs.

The motions were heard by the court on November 14, 2008. This hearing was followed by a telephone conference on November 25, 2008.

The court handed down its opinion on December 11, 2008. In accordance with that opinion, the court makes the following order.

The motions made in the Orders to Show Cause of October 29, November 5, November 6, November 7, November 12, and November 19, 2008, to authorize service of Writs of Execution and to permit the issuance of Restraining Notices, are granted. The Writs of Execution may be served, but no property may be seized except upon further order of the court.

On January 7, 2009, the court signed an additional Order to Show Cause, in which there were applications essentially identical to those contained in the above Orders to Show Cause. The court considers that its December 11, 2008 opinion applies to this additional Order to Show Cause, and the applications therein are granted, in a similar fashion as stated above.

The motion for an attachment and for the issuance of Restraining Notices contained in one of the November 6, 2008 Orders to Show Cause is granted.

The motion of plaintiff NML Capital to confirm the Order of Attachment with regard to its eight cases (05 Civ. 2434, etc.) is granted. The court affirms the continued validity of its October 31, 2008 Order, as modified, permitting restraints and levies in 03 Civ.

2507 and 03 Civ. 8845. Insofar as the Republic moves to vacate the modified October 31, 2008 order in 03 Civ. 2507 and 03 Civ. 8845, that motion is denied.

Insofar as the Republic moves to vacate the temporary relief granted to the plaintiffs pending the hearing of their main motions, the motion of the Republic regarding the temporary relief is denied as moot.

NML's motion for expedited discovery is denied as moot.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed November 23, 2009

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of November, two thousand and nine.

Docket No. [s] 08-5621-cv (Lead), 08-5619-cv (con), 08-5620-cv (con), 08-5622-cv (con), 08-5623-cv (con), 08-5624-cv(xap), 08-5626-cv(con), 08-5630-cv-(con), 08-5691-cv(con), 08-5692-cv(con), 08-5693-cv(con), 08-5694-cv(con), 08-5695-cv-(con), 08-5696-cv(con), 08-5697-cv(con), 08-5698-cv-(con), 08-5699-cv(con), 08-5700-cv(con), 08-5701-cv(con), 08-5702-cv(con), 08-5703-cv(con), 08-5705-cv(con), 08-5708-cv(con), 08-5709-cv(con), 08-5710-cv(con), 08-5711-cv(con), 08-5712-cv(con), 08-5713-cv(con), 08-5714-cv(con), 08-5723-cv(con), 08-5726-cv(con), 08-5727-cv(con), 08-5729-cv(con), 08-5730-cv(con), 08-5731-cv(con), 08-5734-cv(con), 08-5735-cv(con), 08-5737-cv(con), 08-5738-cv(con), 08-5740-cv(con), 08-5741-cv(con), 08-5744-cv(con), 08-5746-cv(con), 08-5747-cv(con), 08-5748-cv (con), 08-5749-cv(con), 08-5750-cv(con), 08-5751-cv(con), 08-5753-cv(con), 08-5754-cv(con), 08-5755-cv(con), 08-5756-cv(con), 08-5757-cv(con), 08-5758-cv(con), 08-5759-cv(con), 08-5760-cv(con),

08-5761-cv(con), 08-5762-cv(con), 08-5769-cv(con), 08-5771-cv(con), 08-5774-cv(con), 08-5775-cv(con), 08-5776-cv(con), 08-5778-cv(con), 08-5779-cv(con), 08-5780-cv(con), 08-5782-cv(xap), 08-5783-cv(con), 08-5790-cv(con), 08-5792-cv(con), 08-5793-cv(con), 08-5794-cv (con), 08-5796-cv(con), 08-5799-cv(con), 08-5800-cv(con), 08-5802-cv(con), 08-5803-cv(con), 08-5807-cv(con), 08-5808-cv(con), 08-5811-cv(con), 08-5817-cv(con), 08-5821-cv(con), 08-5825-cv(con), 08-5829-cv(con) 08-5869-cv(con), 08-5870-cv(con), 08-5872-cv(con), 08-5885-cv(con), 08-5910-cv(con), 08-5913-cv(con), 08-5981-cv(con), 08-6133-cv(con), 08-6135-cv(con), 08-6136-cv(xap), 08-6137-cv(con), 08-6138-cv(con), 08-6242-cv(con), 08-6243-cv(con), 08-6249-cv(con), 08-6250-cv(con), 08-6251-cv(con), 08-6252-cv(con), 08-6253-cv(con), 08-6254-cv(con), 08-6255-cv(con), 08-6256-cv(con), 08-6257-cv(con), 08-6260-cv(con), 08-6261-cv(con), 08-6269-cv(con), 08-6270-cv(con), 09-0151-cv(con), 09-0155-cv(con), 09-0158-cv(con), 09-0160-cv(con), 09-0161-cv(con), 09-0163-cv(con), 09-0164-cv(con), 09-0165-cv(con), 09-0525-cv(con), 09-0803-cv (con), 09-0812-cv (con).

AURELIUS CAPITAL PARTNERS, LP, *et al.*,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ARAUCA BIT AFJP S.A., *et al.*,

Interested-Non-Party Appellants,

ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,
Interested-Non-Party-Appellant.

Appellees Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed December 4, 2009

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of December, two thousand and nine.

Before: John M. Walker, Jr.
J. Clifford Wallace,*
Circuit Judges.

ORDER

Docket. No. 08-5621-cv (L), 08-5619-cv (con), 08-5620-cv (con), 08-5622-cv (con), 08-5623-cv (con), 08-5624-cv (xap), 08-5626-cv (con), 08-5630-cv (con), 08-5691-cv (con), 08-5692-cv (con), 08-5693-cv (con), 08-5694-cv (con), 08-5695-cv (con), 08-5696-cv (con), 08-5697-cv (con), 08-5698-cv (con), 08-5699-cv (con), 08-5700-cv (con), 08-5701-cv (con), 08-5702-cv (con), 08-5703-cv (con), 08-5705-cv (con), 08-5708-cv (con), 08-5709-cv (con), 08-5710-cv (con), 08-5711-cv (con), 08-5712-cv (con), 08-5713-cv (con), 08-5714-cv (con),

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* The Honorable J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

08-5723-cv (con), 08-5726-cv (con), 08-5727-cv (con),
08-5729-cv (con), 08-5730-cv (con), 08-5731-cv (con),
08-5734-cv (con), 08-5735-cv (con), 08-5737-cv (con),
08-5738-cv (con), 08-5740-cv (con), 08-5741-cv (con),
08-5744-cv (con), 08-5746-cv (con), 08-5747-cv (con),
08-5748-cv (con), 08-5749-cv (con), 08-5750-cv (con),
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08-5755-cv (con), 08-5756-cv (con), 08-5757-cv (con),
08-5758-cv (con), 08-5759-cv (con), 08-5760-cv (con),
08-5761-cv (con), 08-5762-cv (con), 08-5769-cv (con),
08-5771-cv (con), 08-5774-cv (con), 08-5775-cv (con),
08-5776-cv (con), 08-5778-cv (con), 08-5779-cv (con),
08-5780-cv (con), 08-5782-cv (xap), 08-5783-cv (con),
08-5790-cv (con), 08-5792-cv (con), 08-5793-cv (con),
08-5794-cv (con), 08-5796-cv (con), 08-5799-cv (con),
08-5800-cv (con), 08-5802-cv (con), 08-5803-cv (con),
08-5807-cv (con), 08-5808-cv (con), 08-5811-cv (con),
08-5817-cv (con), 08-5821-cv (con),08-5825-cv (con),
08-5829-cv (con) 08-5869-cv (con), 08-5870-cv (con),
08-5872-cv (con), 08-5885-cv (con), 08-5910-cv (con),
08-5913-cv (con), 08-5981-cv (con), 08-6133-cv (con),
08-6135-cv (con), 08-6136-cv (xap), 08-6137-cv (con),
08-6138-cv (con), 08-6242-cv (con), 08-6243-cv (con),
08-6249-cv (con), 08-6250-cv (con), 08-6251-cv (con),
08-6252-cv (con), 08-6253-cv (con), 08-6254-cv (con),
08-6255-cv (con), 08-6256-cv (con), 08-6257-cv (con),
08-6260-cv (con), 08-6261-cv (con), 08-6269-cv (con),
08-6270-cv (con), 09-0151-cv (con), 09-0155-cv (con),
09-0158-cv (con), 09-0160-cv (con), 09-0161-cv (con),
09-0163-cv (con), 09-0164-cv (con), 09-0165-cv (con),
09-0525-cv (con), 09-0803-cv (con), 09-0812-cv (con).

AURELIUS CAPITAL PARTNERS, LP, et al.,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ARAUCA BIT AFJP S.A., et al.,

Interested-Non-Party Appellants,

ADMINISTRACIÓ NACIONAL DE SEGURIDAD SOCIAL,

Interesed-Non-Party-Appellant.

The Court's December 2, 2009 order granting the Aurelius parties' motion to stay the mandate in order to petition the Supreme Court to grant a writ of certiorari is hereby vacated. The Aurelius parties' motion to stay the mandate in order to petition the Supreme Court to grant a writ of certiorari is construed as a motion to recall the mandate and to stay the mandate. So construed, it is granted and the mandate is recalled and stayed for twenty-one (21) days from the date of this order. The stay of mandate will be terminated automatically twenty-one (21) days from the date of this order.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk

By: /s/ ANDREW M. CONTRERAS
Andrew M. Contreras, Chief Deputy Clerk

[SEAL]
A True Copy
Catherine O'Hagan Wolfe, Clerk

by [ILLEGIBLE]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed December 2, 2009

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of December, two thousand and nine.

Before: John M. Walker, Jr.
J. Clifford Wallace, *
Circuit Judges.

ORDER

Docket No. 08-5621-cv (L), 08-5619-cv (con), 08-5620-cv (con), 08-5622-cv (con), 08-5623-cv (con), 08-5624-cv (xap), 08-5626-cv (con), 08-5630-cv (con), 08-5691-cv (con), 08-5692-cv (con), 08-5693-cv (con), 08-5694-cv (con), 08-5695-cv (con), 08-5696-cv (con), 08-5697-cv (con), 08-5698-cv (con), 08-5699-cv (con), 08-5700-cv (con), 08-5701-cv (con), 08-5702-cv (con), 08-5703-cv (con), 08-5705-cv (con), 08-5708-cv (con), 08-5709-cv (con), 08-5710-cv (con), 08-5711-cv (con), 08-5712-cv (con), 08-5713-cv (con), 08-5714-cv (con), 08-5723-cv (con), 08-5726-cv (con), 08-5727-cv (con), 08-5729-cv (con), 08-5730-cv (con), 08-5731-cv (con),

08-5734-cv (con), 08-5735-cv (con), 08-5737-cv (con),
08-5738-cv (con), 08-5740-cv (con), 08-5741-cv (con),
08-5744-cv (con), 08-5746-cv (con), 08-5747-cv (con),
08-5748-cv (con), 08-5749-cv (con), 08-5750-cv (con),
08-5751-cv (con), 08-5753-cv (con), 08-5754-cv (con),
08-5755-cv (con), 08-5756-cv (con), 08-5757-cv (con),
08-5758-cv (con), 08-5759-cv (con), 08-5760-cv (con),
08-5761-cv (con), 08-5762-cv (con), 08-5769-cv (con),
08-5771-cv (con), 08-5774-cv (con), 08-5775-cv (con),
08-5776-cv (con), 08-5778-cv (con), 08-5779-cv (con),
08-5780-cv (con), 08-5782-cv (xap), 08-5783-cv (con),
08-5790-cv (con), 08-5792-cv (con), 08-5793-cv (con),
08-5794-cv (con), 08-5796-cv (con), 08-5799-cv (con),
08-5800-cv (con), 08-5802-cv (con), 08-5803-cv (con),
08-5807-cv (con), 08-5808-cv (con), 08-5811-cv (con),
08-5817-cv (con), 08-5821-cv (con), 08-5825-cv (con),
08-5829-cv (con) 08-5869-cv (con), 08-5870-cv (con),
08-5872-cv (con), 08-5885-cv (con), 08-5910-cv (con),
08-5913-cv (con), 08-5981-cv (con), 08-6133-cv (con),
08-6135-cv (con), 08-6136-cv (xap), 08-6137-cv (con),
08-6138-cv (con), 08-6242-cv (con), 08-6243-cv (con),
08-6249-cv (con), 08-6250-cv (con), 08-6251-cv (con),
08-6252-cv (con), 08-6253-cv (con), 08-6254-cv (con),
08-6255-cv (con), 08-6256-cv (con), 08-6257-cv (con),
08-6260-cv (con), 08-6261-cv (con), 08-6269-cv (con),
08-6270-cv (con), 09-0151-cv (con), 09-0155-cv (con),
09-0158-cv (con), 09-0160-cv (con), 09-0161-cv (con),
09-0163-cv (con), 09-0164-cv (con), 09-0165-cv (con),
09-0525-cv (con), 09-0803-cv (con), 09-0812-cv (con).

AURELIUS CAPITAL PARTNERS, LP, et al.,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

ARAUCA BIT AFJP S.A., et al.,

Interested-Non-Party Appellants,

ADMINISTRACIÓ NACIONAL DE SEGURIDAD SOCIAL,

Interesed-Non-Party-Appellant.

IT IS HEREBY ORDERED that the motion by Aurelius Capital Partners *et al.* to recall the mandate pending the filing of a petition for a *writ of certiorari* is GRANTED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk

By: /s/ JOY FALLEK
Joy Fallek, Administrative Attorney

[LETTERHEAD OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

Filed October 20, 2009

MOTION INFORMATION STATEMENT

Docket Numbers(s): 08-5621-cv(L) and consolidated appeals (see Appendix 1)

Motion for: Immediate Issuance of Mandate

Set forth below precise, complete statement of relief sought: An Order that the mandate be issued immediately on the court's October 15, 2009 decision in this appeal and the consolidate appeals.

AURELIUS CAPITAL PARTNERS, LP

—against—

REPUBLIC OF ARGENTINA

ORDER

Before: John M. Walker, Jr., J. Clifford Wallace*, *Circuit Judges*

IT IS HEREBY ORDERED that the motion by the Appellant Republic of Argentina for immediate issuance of the mandate is DENIED.

October 30, 2009
Date

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by

/S/ JUDY PISNANONT
Judy Pisnanont, Motions Staff Attorney

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* The Honorable J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2715 (TPG)

AURELIUS CAPITAL PARTNERS, LP
and AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

—against—

THE REPUBLIC OF ARGENTINA,

Defendant.

No. 07 Civ. 11327 (TPG)

AURELIUS CAPITAL PARTNERS, LP
and AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

—against—

THE REPUBLIC OF ARGENTINA,

Defendant.

No. 07 Civ. 2693 (TPG)

BLUE ANGEL CAPITAL I LLC,

Plaintiff,

—against—

THE REPUBLIC OF ARGENTINA,

Defendant.

ORDER TO SHOW CAUSE

UPON READING AND FILING of the accompanying Declaration of Barry R. Ostrager, Esq., dated October 29, 2008, with the exhibits annexed thereto, the accompanying Memorandum of Law, dated October 29, 2008, and upon all of the papers, pleadings, oral argument and all prior proceedings in the above-captioned actions,

LET THE DEFENDANT HEREIN SHOW CAUSE, before Judge Thomas P. Griesa, Room 26B, at the United States Courthouse located at 500 Pearl Street, New York, on the 6th day of November 2008 at 4:30 pm or as soon thereafter as counsel may be heard, why an Order should not be made and entered:

(a) Authorizing the U.S. Marshals Service to serve Writs of Execution, pursuant to Fed. R. Civ, P. 64 and 69, N.Y. CPLR 5232, 5225, 5227 and 28 U.S.C. § 1610(c), on the Republic of Argentina ("Republic"), Citibank, N.A., Standard Americas, Inc., Standard New York, Inc., Standard New York Securities, Inc. and/or any potential garnishee subsequently deter-

mined through discovery to be within the jurisdiction of the Court, with respect to any property in the United States (whether real or personal, tangible or intangible, presently existing or hereafter arising) which could be assigned or transferred pursuant to CPLR 5201, including but not limited to cash, deposits, real property, instruments, securities, security entitlements, security accounts, equity interests, claims, and contractual rights, and interests of any kind in the foregoing, held or maintained in the name of or for the use or benefit of:

(i) Administración Nacional de Seguridad Social ("ANSES"), such property hereafter collectively referred to as "ANSES Property"; or

(ii) any of the follwowing Argentine Pension Funds ("Fondo de Jubilaciones y Pensiones", hereafter collectively "FJP Funds"), which the Republic has announced plans to nationalize, such property hereafter collectively referred to as "FJP Property":

1. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Arauca Bit AFJP SA.

2. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Consolidar AFJP SA.

3. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Futura AFJP SA.

4. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Máxima SA AFJP.

5. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Met AFJP SA.

6. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Nación AFJP SA.

7. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Orígenes AFJP SA.

8. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Previsol AFJP SA.

9. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Profesión+Auge AFJP.

10. The Argentine Fondo de Jubilaciones y Pensiones that is managed by Unidos SA AFJP.

For the avoidance of doubt and without limiting the foregoing, ANSES Property and FJP Property shall include all securities beneficially owned by an FJP Fund or ANSES through an account maintained in the United States, regardless of where those securities are traded, the issuers located, or certificates representing those securities are ultimately held.

(b) Authorizing the issuance of Restraining Notices, pursuant to N.Y. CPLR 5222, 28 U.S.C. § 1610(c) and Fed. R. Civ. P. 69(a), directed to the Republic of Argentina, Citibank. N.A., Standard Americas, Inc., Standard New York, Inc., Standard New York Securities, Inc., and/or any potential garnishee subsequently determined through discovery to be within the jurisdiction of the Court that holds or maintains any FJP Property or ANSES Property in the United States, from taking any action or issuing any instruction to transfer or remove any FJP Property or ANSES Property from the United States.

(c) Authorizing expedited discovery pursuant to Fed. R. Civ. P. 69 from the Republic of Argentina, Citibank, N.A., Standard Americas, Inc., Standard New York, Inc., Standard New York Securities, Inc., and any other garnishee which may subsequently be identified through discovery to be within the jurisdiction of the Court, to assist Plaintiffs in identifying property in the United States that is, or that is to be nationalized so as to become, the property of the Republic and available to satisfy Plaintiffs' final money judgments entered by this Court against the Republic; and

(d) granting such other and further relief as this Court may deem just, proper and necessary under the circumstances.

SUFFICIENT CAUSE BEING ALLEGED THEREFORE, IT IS HEREBY:

ORDERED THAT Plaintiffs are authorized to deliver to the U.S. Marshals Service Writs of Execution, pursuant to Fed. R. Civ. P. 64 and 69, N.Y. CPLR 5232, 5225, 5227 and 28 U.S.C. § 1610(c), directed to the Republic of Argentina, Citibank N.A., Standard Americas, Inc., Standard New York, Inc., Standard New York Securities, Inc., and/or any appropriate garnishee subsequently determined through discovery to be within the jurisdiction of the Court, so as to maintain priority pursuant to N.Y. CPLR 5232(a) and 5234(b) in relation to other creditors of the Republic while Plaintiffs' application is pending. The Notice of Levy shall specify in accordance with CPLR 5232 that it applies to FJP Property and ANSES Property, as defined above. The U.S. Marshals Service is directed to defer serving the Writs of Execution or levying upon any FJP Property or

ANSES Property until further order of this Court. Pursuant to CPLR 5232(a), Plaintiffs' priority is hereby extended as necessary beyond 90 days until such time as the Court finally resolves Plaintiffs' application.

IT IS FURTHER ORDERED THAT Plaintiffs are authorized pursuant to N.Y. C.P.L.R 5222, 28 U.S.C. § 1610(c) and Fed. R. Civ. P. 69(a), to issue Restraining Notices to the Republic of Argentina, Citibank, N.A., Standard Americas, Inc., Standard New York Inc., Standard New York Securities, Inc., and/or any potential garnishee subsequently determined through discovery to be within the jurisdiction of the Court that may hold FJP Property or ANSES Property in the United States, restraining the recipient from taking any steps or issuing any instructions to transfer or remove, either directly or indirectly, any FJP Property or ANSES Property from the United States. The Restraining Notices shall specify in accordance with this Order that they are limited to restraining the transfer or removal of FJP Property or ANSES Property in the United States out of the United States and shall specify that they do not prevent or restrain the day-to-day operation or investment management of any FJP Property or ANSES Property in the United States so long as that property is not removed from the United States (or for the avoidance of doubt moved or transferred from one location or account within the United States to another location or account in the United States for the purpose of evading the Restraining Notice as directed to a particular entity or otherwise for the purpose of transferring or removing FJP Property or ANSES Property from the United States through a combi-

nation or series of intermediate steps within the United States).

* * *

IT IS FURTHER ORDERED THAT opposing papers, if any, are to be served upon counsel for plaintiffs, Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, NY 10017, attention Barry R. Ostrager, Esq., so as to be received by 12:00 p.m. on the 5th day of November 2008;

* * *

Date: October 29, 2008

SO ORDERED.

/S/ THOMAS P. GRIESA
Hon. Thomas P. Griesa. U.S.D.J.

28 U.S.C. § 1603

For purposes of this chapter—

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1610

(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

* * *

[A-2506]

OFFICIAL GAZETTE OF THE ARGENTINE REPUBLIC

Buenos Aires
Tuesday, December 9, 2008
Year CXVI
Issue 31,548
Price $0.90

* * *

LAWS

ARGENTINE INTEGRATED PENSION SYSTEM

Law 26,425
Public Pension System. Unification.
Signed Into Law: November 20, 2008.
Promulgated: December 4, 2008.

The Senate and the House of Representatives of the Argentine Nation gather to Congress, etc., approve with the force of Law:

* * *

TITLE II

The Resources of the System

ARTICLE 7. The resources comprising the individual capitalization accounts of the affiliates and beneficiaries of the capitalization program of the Integrated Retirement and Pension System provided for in Law 24241 as amended are to be transferred in kind to the National Social Security Administration, with the restrictions provided for in Article 5 of this law. These assets will become part of the Fund to Guarantee Sustainability of the Public Pension Distribution System created by Decree 897/07.

[A-2513]

Tuesday, December 9, 2008
First Section
OFFICIAL GAZETTE Issue 31,548
4

* * *

ARGENTINE INTEGRATED PENSION SYSTEM

Decree 2104/2008

* * *

ARTICLE 3. The transfer of the resources comprising the individual capitalization accounts of the affiliates and beneficiaries of the Capitalization Program of the Integrated Retirement and Pension System provided for in Article 7 of Law No. 26425, to the FUND TO GUARANTEE SUSTAINABILITY OF THE ARGENTINE INTEGRATED PENSION SYSTEM (FGS), with the restrictions provided for in Article 6 of this law, will occur as a matter of law, in the same kind as that in which they are invested. For this purpose, financial institutions, Central Securities Depositories, Mutual Fund Management Companies and all depository or collection entities shall establish the NATIONAL SOCIAL SECURITY ADMINISTRATION (ANSES) as the sole and exclusive holder of those assets and rights (FGS LAW No. 26425).

Supreme Court, U.S.
FILED
JAN 21 2010
OFFICE OF THE CLERK

No. 09-723

IN THE
Supreme Court of the United States

AURELIUS CAPITAL PARTNERS LP, *et al.*,

Petitioners,

v.

THE REPUBLIC OF ARGENTINA,
ARAUCA BIT AFJP S.A., *et al.*,
ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL

MARCO E. SCHNABL
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227681

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STATUTORY PROVISIONS INVOLVED

Section 1609 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA") provides

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."

28 U.S.C. § 1609.

Section 1610(a) of the FSIA authorizes execution against property of a foreign state located in the United States only if the property is "used for a commercial activity in the United States," even if the foreign sovereign has waived its immunity. 28 U.S.C. § 1610(a).

Section 1610(b) of the FSIA states that the property of an "agency or instrumentality of a foreign state engaged in commercial activity in the United States" may be attached only in certain specific circumstances (*e.g.*, if the "agency or instrumentality" has "waived" immunity from execution). 28 U.S.C. § 1610(b).

Section 1603(b) of the FSIA defines "agency or instrumentality of a foreign state" as

> any entity–

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 U.S.C. §§ 1332(c) and (e)] nor created under the laws of any third country.

28 U.S.C. § 1603(b).

STATEMENT OF THE CASE

Petitioners – a Cayman Islands vulture fund and its Delaware affiliates – seek to have this Court review the judgment of the United States Court of Appeals for the Second Circuit[1] vacating a December 11, 2008 order of the United States District Court for the Southern District of New York (the "December 11, 2008 Order," and, together with the other orders appealed from below, the "Orders") obtained to enforce judgments against the sovereign Republic of Argentina (the "Republic").

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1. Justice Sotomayor presided over oral argument in the Second Circuit, but was appointed to this Court in August of 2009, before the decision was issued. The two remaining panel members, Judges Walker and Wallace, being in agreement, determined the matter. *See* Appendix to Petition ("Pet. App.") at 4a.

Although this case is one of the latest in a series of attempts by holders of Argentine sovereign bonds to enforce judgments against the Republic, the Orders are unique in that, had they been upheld, they would have transferred money from Argentine retirees and workers and into the pockets of the offshore, private funds that purchased Argentine sovereign bonds at a deep discount.

Respondent Administración Nacional de Seguridad Social ("ANSES") is an autonomous statutory agency created under Argentine law, responsible for administering Argentina's social security system. ANSES was not named as a party to the proceedings below, never issued any bonds, has not waived sovereign immunity and has appeared in this proceeding on a special, limited basis to oppose the Orders, which purported to freeze "ANSES Property."[2]

Until late 2008, Argentina's mandatory pension system was a mixed arrangement, with ANSES administering certain of the pension contributions made by Argentine workers, and private managers administering other such funds. Under Argentine law, both ANSES and the private managers were subject to strict legal constraints on the manner in which they managed these assets, including that the investments under their control could only be invested and applied to pay for social security benefits.

2. The Second Circuit held that ANSES had standing to appeal the Orders as an "interested non-party," as they placed ANSES property "at stake." Pet. App. at 14a. Petitioners do not contest this ruling and have named ANSES as a respondent to the Petition. Pet. at vii.

On October 21, 2008, Argentina's government announced that this system would be unified under ANSES's overall management. Under these announced reforms, which at that time were not yet law, the private managers would be required to repatriate in kind to Argentina all investments held abroad so that they could be managed by ANSES.

On October 29, 2008, galvanized by these announced reforms, Petitioners successfully moved before the district court for orders freezing any Argentine social security funds in the United States, resulting in the freezing of approximately $200 million of Argentine workers' funds. Petitioners claimed that these funds should be made available to them in satisfaction of the Republic's debts.

On December 9, 2008, a law went into effect unifying the Argentine national pension system and requiring that all pension resources then administered by private managers be absorbed into a "Guarantee Fund" located in Argentina and administered by ANSES. This law, however, remains unimplemented as regards Argentine workers' social security funds located in the United States, because these funds were frozen in place by the attachments and restraints issued by the district court before the law was enacted.

Two days after the Argentine law went into effect, the district court issued its December 11, 2008 Order, holding that Argentine workers' social security funds located in the United States could be executed and made available to the Republic's judgment creditors, including Petitioners. Over objections by ANSES and

the Republic, the district court held that these funds fell within the execution exception to sovereign immunity because, (1) ANSES and the Republic were legally indistinguishable; and (2) the funds were "used for commercial activity" in the United States for purposes of 28 U.S.C. § 1610(a)(1).

Reversing, the court of appeals held that the funds were not subject to attachment because neither ANSES nor the Republic had "used" them for a "commercial activity" in the United States for purposes of § 1610(a)(1) of the FSIA. The only "use" to which the funds had been put was that an Argentine statute had transferred "legal control" of the funds from the private managers to ANSES. This, the Second Circuit held, was a sovereign act, not a commercial use of the funds. There being no other use to which these funds had been put by ANSES or the Republic, the December 11, 2008 Order was invalid by virtue of § 1609 of the FSIA. All the Orders were therefore vacated. This dispositive holding made it unnecessary for the Second Circuit to consider the numerous other grounds advanced by ANSES and the Republic for vacating the Orders, including ANSES's argument that its property, let alone property it merely managed for others, was separate from that of the Republic and therefore not available to be attached in satisfaction of the Republic's debts under well-established FSIA authority.

The Second Circuit's decision is grounded on unique fact-based determinations of no significance beyond the particular circumstances in this case. This, combined with the absence of any conflict between the Second Circuit's decision and this Court's jurisprudence, as well as the absence of a circuit split, makes this case inappropriate for certiorari review.

A. The 1991 Decree Establishing ANSES as the National Entity Responsible for Administering the Unified Argentine Social Security System

ANSES is the Argentine Social Security Administration statutorily responsible for administering the mandatory pension contributions of Argentine workers and distributing retirement, disability, survivor and similar benefits to social security beneficiaries. Pet. App. at 6a.[3] Under its 1991 founding decree, ANSES is an "*entidad autárquica*," "a 'decentralized entity'" that operates under "'the jurisdiction of the Ministry of Labor and Social Security.'" Pet. App. at 33a (quoting Argentine Decree No. 2741/1991, Dec. 26, 1991 (hereinafter "1991 Decree"), art. 1). ANSES "has the power to manage its own administration and finance, independent of the [Argentine] national treasury." *Id.* at 33a-34a (quoting 1991 Decree, art. 3). Moreover, "[u]nder Argentine law, ANSES may enter into contracts, sue and be sued, and acquire assets in its own name." *Id.* at 34a. Under Argentine law, therefore, ANSES possesses its own juridical existence, separate from the Republic.

ANSES-managed funds are effectively held in trust for social security beneficiaries. "Argentine law . . . provides that ANSES assets cannot be attached and can only be used for payments to beneficiaries." *Id.*

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3. The Argentine constitution guarantees that the government shall "provide social security benefits to its citizens." Pet. App. at 6a. Article 14*bis* of the Argentine Constitution states that "'[t]he State shall grant the benefits of social security, which shall be of an integral nature and may not be waived.'" *Id.*

B. The 1993 Reforms Create a Mixed Pension Arrangement, Authorizing Private Managers (AFJPs) to Administer Argentine Pensioners' Funds

At the time of ANSES's establishment in 1991, Argentina had a "unified social security system, known as the 'Distribution System.'" *Id.* at 6a. In 1993, Argentina reformed its pension system "to create a hybrid regime that allowed Argentine workers and pensioners to choose between the Distribution System and a new private plan, the 'Capitalization System.'" *Id.* Under the Capitalization System, workers could contribute to accounts managed by private fund managers called *Administradoras Fondos de Jubilaciones y Pensiones* ("AFJPs"). *Id.* at 6a, 33a. The AFJPs comprised the "private" management aspect of Argentina's then-existing hybrid social security system.

Like ANSES, the AFJPs were trustees, in that "[b]y law, the assets in the [AFJP-administered] funds were only to be used to provide social security benefits, and the [AFJPs] did not have property rights in the funds' assets." *Id.* at 6a. Specifically, "[t]he law provided that these assets could be used only to generate social security benefits, did not belong to the AFJP, and were not subject to attachment." *Id.* at 35a (citing Law No. 24,241, Oct. 13, 1993, art. 82).

Some of the AFJP-managed funds were invested in the United States, "where the [AFJPs] invested the funds to grow for the benefit of the pensioners." *Id.* at 6a. Thus, the record is clear that *all* the funds at issue in this case came from mandatory contributions of Argentine social security beneficiaries, and, under Argentine law, could be applied only to the payment of Argentine social security benefits.

C. The Establishment in 2007 of the "Guarantee Fund"

In 2007, "[d]issatisfied with the Capitalization System," Argentina's legislature passed a law authorizing the holders of private accounts (administered by the AFJPs) "to switch back to the Distribution System." *Id.* "In order to facilitate this transition, the Argentine Congress passed a decree establishing the Sustainability Guarantee Fund (Guarantee Fund), which received the social security funds transferred from the Capitalization System and was managed by [ANSES]." *Id* at 6a-7a. Located in Argentina, the Guarantee Fund "is funded by the assets of workers who moved from the private pension system to the public system, as well as ANSES budget surpluses and investment returns." *Id.* at 34a.

Reinforcing that it is essentially trust property, the Guarantee Fund, like other social security funds administered by ANSES and the AFJPs, may only be invested in a manner that satisfies the "criteria of 'safety and profitability'" established by a statutory management committee. *Id.* (citing Decree No. 897/2007, July 12, 2007, art. 8). And, again reflecting its trust status, "[t]he law establishing the Guarantee Fund provided that its assets could be used only to provide social security benefits to qualifying participants." *Id.* at 7a.

D. The Argentine Government's October 2008 Announcement that the National Pension System Will be Reunified

On October 21, 2008, the Argentine government proposed legislation "requiring the reunification of the bifurcated social security system." *Id.* Under this proposal, which effectively restored the administration of social security resources to their pre-1993 arrangements, all the assets in the Capitalization System (*i.e.*, all monies administered by the AFJPs) would be required to be transferred to the Guarantee Fund under ANSES's management in Argentina. *Id.* The proposed legislation also reaffirmed that assets in the Guarantee Fund may only be used to provide social security benefits for Argentine workers and pensioners. *Id.*

At the time of this legislative proposal, certain Argentine pension funds were being administered by AFJPs through accounts located in the United States. *Id.* at 7a. Although these pensioner monies were potentially subject to the Argentine government's (proposed but not yet enacted) reforms, they were, at this time, entirely in the hands of the AFJPs, which themselves were, in the words of the Second Circuit, "*indisputably private entities.*" *Id.* at 10a-11a (emphasis added).

E. The October 2008 Restraints and the Embroiling of ANSES in This Litigation

On October 29, 2008, Petitioners successfully moved the United States District Court for the Southern District of New York for emergency orders restraining all Argentine social security assets said to be located in the United States and managed by AFJPs, defined by Petitioners as including all so-called "ANSES Property" in the United States. *Id.* at 81a. Petitioners posited the theory that the proposed legislation, if passed, would effect a transfer of the AFJP-managed funds *to the Republic itself*, for the Republic's own purposes, and, therefore, would render the funds susceptible to execution in satisfaction of the Republic's debts, *see id.* at 8a – thus enabling pensioners' money to flow directly into Petitioners' pockets.

This application resulted in the freezing of some $200 million of Argentine pensioners' monies ("the Funds") based entirely on Petitioners' theory that, although in the hands of "indisputably private entities," they should nonetheless be treated as "ANSES Property," and, by extension, the Republic's property. *Id.* at 8a, 32a, 81a.

Shortly thereafter, numerous other judgment creditors of the Republic – including the vulture funds EM Ltd. ("EM"), NML Capital, Ltd. ("NML") and GMO Emerging Markets L.P. ("GMO") – obtained further orders, including pre- and post-judgment attachments over "ANSES Property" that invoked 28 U.S.C. § 1610, and sought (and were later issued) "Writs of Execution" over the Funds. *Id.* at 8a.

ANSES, although not a party,[4] immediately sought to vacate these orders to the extent that they affected or could affect "ANSES Property." ANSES presented undisputed evidence showing that it was legally separate from the Republic and further demonstrating that ANSES itself did not have or hold any property in the United States. *Id.* at 36a, 44a. On November 14, 2008, rejecting ANSES's application, the district court continued its various measures freezing the Funds.

On November 24, 2008, the district court entertained yet another set of applications, this time from EM and NML. Citing the expected imminent passage of the Argentine pension reform legislation, EM and NML sought and were granted new attachment orders and a restraining order directed, in part, against ANSES, effective immediately upon the new law taking effect. *Id.* at 20a; Br. for NML and EM in Support of the Petition ("EM/NML Br.") at 6 n.2.

F. The December 9, 2008 Pension Unification Law Required the Funds to be Repatriated to Argentina so That ANSES Could Administer Them There

On November 20, 2008, the Argentine Legislature passed Law 26,425 (the "Pension Unification Law"), which came into effect on December 9, 2008. Pet. App.

4. Though Petitioners purported to restrain "ANSES Property," they never served ANSES with process in the proceedings below; nor was ANSES ever named as a defendant in the underlying suits on the sovereign bonds or in the prior proceedings below to enforce the judgments. ANSES's objections to these procedural shortcomings, which independently justified vacating the Orders, were mooted once the Orders were vacated on other grounds.

at 9a-10a. Entitled "Public Social Security System, Unification," the new law eliminated the private management component of the social security system, and restored the ANSES-managed regime that had existed before private management had been allowed to co-exist with ANSES's management in 1993. *Id.* at 10a, 89a.

The Pension Unification Law "mandat[ed] that the majority of the funds previously administered by the [AFJPs] be transferred in kind to the Guarantee Fund administered by [ANSES] in Argentina." *Id.* at 9a-10a. Consistent with previous legislation regulating the prudential criteria for the management of Argentine pensioners' funds, the law provides that "the assets of the funds shall be invested 'by applying criteria of sufficient security and profitability while contributing to the sustainable development of the real economy.'" *Id.* at 10a (quoting Pension Unification Law, art. 8). The law further stated "that '[t]he total amount of the funds may only be employed to make payments in the Argentine Integrated Pension System,'" *id.* (quoting Pension Unification Law, art. 8) (alteration in original), and "that social security funds managed by [ANSES] may be invested only in Argentine securities." *Id.*

Effectively, therefore, the Pension Unification Law required that any AFJP funds be repatriated to Argentina. Only if located in Argentina could they be placed under ANSES's management. *Id.* Only upon repatriation could they be invested by ANSES in conformity with the new law, *i.e.*, "only in Argentine securities." *Id.* Nevertheless, because of the Orders freezing and attaching these funds as at December 9,

2008, some of which dated back to October of 2008 and some of which became "effective immediately upon the passage of [the Pension Unification Law]," *id.* at 20a, these critical elements of the law were not "implemented." *Id.* at 11a.

G. The December 11, 2008 Order

Two days later, by its December 11, 2008 Order, the district court confirmed the prior Orders and granted Petitioners' (and other bondholders') motions for writs of execution over the Funds. *Id.* at 10a-11a, 23a-58a.

In its opinion, the district court held that, notwithstanding ANSES's unchallenged legal separateness from the Republic, the Funds were the property of the *Republic* itself, because, in the district court's view, ANSES and the Republic were indistinguishable. *Id.* at 49a.[5] Upon this premise, the

5. Before the Second Circuit, ANSES demonstrated it was legally separate from the Republic under Argentine law and therefore an "agency or instrumentality" of a foreign state under §§ 1603(b) and 1610(b) of the FSIA. Therefore, under this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-26, 633-34 (1983) ("*Bancec*"), ANSES's property was separate from that of the Republic, and could not be attached in satisfaction of the Republic's debts. ANSES also argued that the maintenance of investments for the purpose of funding social security payments is a quintessentially *governmental*, non-commercial activity, thus rendering the Funds immune from execution under either §§ 1610(a) or 1610(b), *see* Pet. App. at 21a-22a. The Second Circuit found it unnecessary to reach these arguments, given the narrow fact-based ground on which it vacated the Orders. *See* Pet. App. at 21a-22a.

district court held that the Funds were excluded from sovereign immunity because they were being "used for a commercial activity in the United States" for purposes of § 1610(a) of the FSIA, as they had been used "in the hope of profit" while under the administration of the private AFJPs. *Id.* at 53a.

During the pendency of ANSES's appeals, enforcement of the Orders was suspended. *Id.* at 11a. Meanwhile, because the Orders had "'froze[n]'" the AFJPs' funds in the United States, ANSES "[was] unable to take possession of the funds, and the new law transferring the funds to [ANSES] [was not] implemented." *Id.*

H. The Second Circuit Vacates the Orders

On October 15, 2009, a panel of the Second Circuit unanimously held that each of the district court's restraints should be vacated.

The Second Circuit began by noting the accepted principle that, as set forth in § 1609 of the FSIA, foreign state property is generally immune from execution, unless the property "fits within one of the limited exceptions enumerated in section 1610 or 1611 of the [FSIA]." *Id.* at 17a. For property to be subject to attachment and execution under 28 U.S.C. § 1610, it "must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued." Pet. App. at 18a (quoting 28 U.S.C. § 1610(a)). These "statutory criteria," it stressed, remain essential "'[e]ven when a foreign state completely waives its

immunity from execution.'" *Id.* (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002)).

The Second Circuit further noted that, under the plain language of § 1610(a), property of a foreign state is only susceptible to execution if it is *currently being used by the foreign state itself* for a "commercial activity." *Id.* at 18a-19a. Thus, the mere possibility that the property "'could potentially be used'" at some other time for such activities does not suffice to bring foreign state property within the "used for a commercial activity" exception in § 1610(a). *Id.* The prior actions of private corporations with respect to such property are "irrelevant" to this "inquiry." *Id.* at 20a.

Here, the record showed that the funds of Argentine pensioners had never been "used" for a "commercial activity" by the Republic or ANSES. It followed that the funds in question were not susceptible to attachment or execution under § 1610(a):

> Because the order attaching the assets of [ANSES] became effective immediately upon the passage of legislation transferring the assets from the private corporations to [ANSES], neither [ANSES] nor the Republic had the opportunity to use the funds for any commercial activity whatsoever. The only activity that the Republic had engaged in with regard to the funds at the time that the district court confirmed the Orders was the adoption of a law [the Pension Unification Law] transferring legal control of the funds

> from the private corporations to [ANSES]. As we read "used for a commercial activity," we hold that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity." A contrary conclusion would essentially nullify the [FSIA's] commercial activity requirement in cases involving attachment and execution of a foreign state's property.

Id. at 20a.

Accordingly, the Second Circuit concluded that these funds remained immune from attachment – regardless of whether ANSES was to be viewed as separate from the Republic. *Id.* This holding obviated the need to consider ANSES's and the Republic's other arguments in favor of vacatur. *Id.* at 21a-22a; *see also supra* p. 11 n.4, p. 13 n.5. The district court's December 11, 2008 Order and all other related Orders were therefore vacated. Pet. App. at 22a.

Petitioners thereafter moved for panel rehearing and rehearing *en banc*. On November 11, 2009, the panel denied Petitioners' request for panel rehearing. On November 23, 2009, request for a rehearing *en banc* was also denied. *Id.* at 69a. The Second Circuit's mandate has been stayed pending determination of this Petition. *Id.* at 72a.

REASONS FOR DENYING THE PETITION

The Petition should be denied first because it predominantly seeks to overturn *fact-based determinations* of the Second Circuit that are not a proper subject matter for certiorari. The fact-bound nature of the Petition is readily apparent from its repeated claims that the Second Circuit's factual analysis regarding the effect of the Orders and the use of the Funds during the pendency of the Orders was "erroneous." As but one example, Petitioners' contention that the Funds had not been effectively "frozen" as of the date of the December 11, 2008 Order is a straightforward (and untenable) challenge to the Second Circuit's factual characterization of the Orders, not a challenge to its legal analysis. This is not a suitable issue for certiorari review.

The sole *legal* conclusion reached by the Second Circuit – namely, "that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity,'" Pet. App. at 20a – presents no conflict with any circuit authority or this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 407 (1992). *Weltover* held that when a state engages in "garden-variety" market conduct, it engages in "commercial activity" and thus becomes susceptible to the *jurisdiction to be sued* in United States courts under § 1605(a)(2) of the FSIA, regardless of the "motive" or "purpose" underlying such activity. *Weltover*, 504 U.S. at 614. *Weltover* did not involve attempted *execution* against foreign state property pursuant to the narrower "used for" standard of § 1610, nor did it consider

whether a sovereign entity that receives legal or managerial control over an asset should be deemed, without more, to have used the asset for a commercial activity, much less hold this to be the case. Because the Second Circuit's decision presents no conflict with either *Weltover* or any circuit decision addressing § 1610, certiorari is inappropriate.

This case does not, as Petitioners claim, present issues that are "certain to recur in a broad variety of contexts under the FSIA," Pet. at 26, nor does it create "substantial uncertainty" about the scope of sovereign immunity, *id.* at 3, or, least of all, "profoundly affect[]" United States foreign relations. EM/NML Br. at 7. On the contrary, it involves a narrow holding, on peculiar facts unlikely to be repeated, involving statutory provisions – 28 U.S.C. §§ 1609-10 – whose meaning is clear and as to which there is no circuit split. The Petition should be denied.

I. THE SECOND CIRCUIT'S FACT-SPECIFIC HOLDING THAT THE FROZEN FUNDS HAD NOT BEEN PUT TO ANY "USE," MUCH LESS COMMERCIAL USE BY ANSES, DOES NOT PRESENT AN APPROPRIATE ISSUE FOR CERTIORARI, AND WAS IN ANY EVENT PLAINLY CORRECT

The Second Circuit's vacatur of the December 11, 2008 Order and all related Orders characterized these Orders as having "frozen" the Funds so that, when the Pension Unification Law was enacted, ANSES was deprived of any "opportunity to use the funds for any commercial activity whatsoever." Pet. App. at 20a. The

court of appeals further determined that, prior to the Law's enactment, the funds were indisputably in the hands of private entities. *Id.* It followed, again as a purely factual matter, that the only "use" to which the Republic had put the funds was to enact a law transferring "legal control" of the funds to ANSES. *Id.* Based on these fact-specific holdings based on undisputed facts, it necessarily followed that the assets had not been "used" for a commercial activity by ANSES or the Republic. *Id.*

Petitioners maintain that these characterizations of the factual record were "erroneous." Pet. at 13, 21-22. In their place, Petitioners advance a fanciful alternative factual thesis, contending that: (1) rather than "freezing" the Funds, the Orders issued in October and November of 2008 left ANSES free to "adopt[] the same investment 'use' of the [Funds] as the [AFJPs] that previously held the accounts," *Pet.* at iii; *see also id.* at 19-20; and (2) in the "months that followed" the enactment of the Pension Unification Law on December 9, 2008, *id.* at 2, ANSES and/or the Republic unilaterally "decided," *id.* at 21, that the Funds should be "maintained on [their] behalf by third-party financial institutions in the United States," *id.* at 3, thus preserving "the same 'use' of the [Funds]. . . as the [AFJPs]." *Id.* at 21; *see also id.* at 20-21.[6] Upon these

6. Petitioners also claim the district court "found" that, after passage of the Pension Unification Law on December 9, 2008, ANSES "assumed unfettered discretion and control to use the [Funds]." Pet. at 10. The district court's opinion does not contain any such "finding." The cited passages from the district court's opinion merely set forth the district court's views

(Cont'd)

alternative factual characterizations – some of which were not advanced below until *after* the Second Circuit's October 15, 2009 opinion – Petitioners now claim that the Funds actually were "used for a commercial activity" by ANSES and/or the Republic and remain subject to such "use" today.

Supreme Court Rule 10 states that "a petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Even if Petitioners' erroneous factual contentions had merit, this principle warrants denial of the Petition.

A. The Second Circuit's Factual Conclusion that the Orders Had Effectively "Frozen" the Funds Was Plainly Correct

Petitioners challenge as "erroneous" the Second Circuit's fact-specific conclusion that the Funds were "attached" by the Orders issued by the district court in October and November of 2008. Pet. at 12. This flies in the face of the record and common sense. The record shows that from October 28, 2008, onwards, the Funds were subjected to a veritable barrage of pre- and post-judgment attachments and restraints in "72 actions,"

(Cont'd)

on ANSES's *past* performance as manager of its own funds, *see* Pet. App. at 36a-38a, as well as the its subjective views on ANSES's relationship with the Republic, *id.* at 48a-49a, and its belief that the funds as managed by the private AFJPs had been held for investment purposes, *id* at 53a.

Pet. App. at 8a, starting with the restraining orders obtained by Petitioners pursuant to Rule 5222 of the New York Civil Practice Law and Rules ("N.Y. C.P.L.R."), followed by the "restraining orders and attachments" obtained by other bondholders. *Id* at 8a. These included post-judgment restraints and pre-judgment attachments obtained by EM and NML pursuant to N.Y. C.P.L.R. §§ 5222 and 6201,[7] as well as an order obtained by GMO that authorized it to deliver to the U.S. Marshals service "Writs of Execution pursuant to Fed. R. Civ. P. 64 and 69, N.Y. C.P.L.R. 5232, 5225, 5227 and 28." This broadside of "freezes," "attachments" and "restraints" purportedly issued pursuant to the execution provision of the FSIA, 28 U.S.C. § 1610(a), barred, first the AFJPs and then ANSES, from doing

7. Petitioners claim that the "attachments" obtained by EM and NML were not actually "attachments," Pet. at 11, but rather "served only to restrain the [Funds] from being removed from the United States pending authorization from the District Court to attach or execute upon the [Funds] under the FSIA, while permitting those assets to continue to be actively traded by the Republic" after the enactment of the Pension Unification Law. *Id* (emphasis removed); *see also id* at 19-20 n.8. However, the record is barren of *any* suggestion that ANSES actually *did* manage or trade these assets in the United States. This is not surprising, as ANSES lacked legal power to hold or manage investments abroad after the passage of the Pension Unification Law. Moreover, speculation as to what ANSES "could" have done is untenable in the face of the attachments obtained by NML, which on their face, were just that: pre- and post-judgment "attachments" – a fact which NML itself readily acknowledges in its own submission in support of certiorari review. EM/NML Br. at 2 n.1 ("Petitioner's assertion that NML neither obtained an attachment order nor levied on the subject property is incorrect." (citation omitted)).

the *only* thing that Argentine law allowed and demanded, namely that the assets be repatriated in kind to Argentina for management by ANSES there. Certain of the Orders obtained by EM and NML took effect immediately upon passage of the Pension Unification Law on December 9, 2008. Pet. App. at 19a.[8] Once the law took effect, "NML and EM delivered writs of execution." EM/NML Br. at 6 n.2. The Second Circuit's characterization of the Orders issued in October and November of 2008 as "restraining orders and attachments," Pet. App. at 8a, is therefore unassailable.

Petitioners argue that the Second Circuit, rather than treat the Orders as "attachments" for purposes of §§ 1609-11, should have recognized an implied power of district courts "to prevent the foreign state from removing, or otherwise altering the use of," property in the United States, pending a determination whether an FSIA exception to immunity from attachment applies to such property. Pet. at 25. Petitioners quibble that the December 11, 2008 Order should not have been characterized as an "attachment," but should have been regarded merely a "narrowly-tailored restraining order[]," issued under the so-called "inherent" jurisdiction of the district court pursuant to the All Writs Act, 28 U.S.C. § 1651, pending a *future* determination

8. According to Petitioners, "[t]he Court of Appeals' conclusion that 'the order attaching the assets of the Administration was effective immediately upon transfer' presupposes a contested issue of New York law that is currently *sub judice* before the District Court." Pet. at 19 n.5. Even were Petitioners correct, this alone would support denial of the Petition, as it would require the Court to resolve disputed state law issues.

whether the Funds indeed were subject to attachment under the FSIA. Pet. at 14, 24, 26. The notion that sovereign property can be restrained outside the narrow confines of the FSIA pending some future determination whether future events would warrant future attachment is squarely foreclosed by § 1609's general restriction on "attachment arrest and execution" of foreign state property and the universally broad reading courts have given to § 1609. *See, e.g., Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1995); *Alejandre v. Telefonica Larga Distancia, de P.R., Inc.*, 183 F.3d 1277, 1283 (11th Cir. 1999); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) ("The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.").[9] This is not a "procedural catch-22," as Petitioners claim, Pet. at 27, but the result of Congress's considered legislative decision to constrain the ability of parties to levy execution on sovereign assets. Petitioners' lament that there should be a better way for creditors to attach the immune assets of a foreign sovereign should be addressed to Congress, not the judiciary.

9. Predictably, the cases cited by Petitioners regarding district courts' general power to "prevent removal of assets from the United States when that would frustrate a court's ability to enforce its judgment," Pet. at 26, *did not involve FSIA issues.* Likewise, the All Writs Act itself, 28 U.S.C. § 1651(a), does not purport to derogate from foreign sovereign immunity. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 n.9 (9th Cir. 1996) (vacating injunction against foreign state's property: "the All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute" (citation omitted)).

It is sheer folly to suggest that, as of December 9, 2008, "no 'attachment' or levy of the [Funds] had occurred," *id.* at 16, when the record is so squarely to the contrary. The Funds were improvidently frozen while being managed by indisputably private parties in October 2008, and the Second Circuit's conclusion that the Funds were also frozen as of and from the enactment of the Argentine Pension Unification Law on December 9, 2008, thus is plainly correct.

B. The Second Circuit's Conclusion that ANSES Was Deprived of Any Opportunity to "Use" the Funds for "Any Activity Whatsoever" Was Correct

Petitioners also challenge as "erroneous" the finding of the Second Circuit that the only "use" to which the Funds had been put by the Argentine legislature was "the adoption of a law transferring legal control of the [Funds] from [the AFJPs] to [ANSES]." Pet. App. at 20a. Instead, they remarkably claim, that ANSES elected to "adopt" the AJFPs' past investment practices with respect to the Funds. Pet. at 12, 21.[10]

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10. Petitioners do not challenge the general principle that § 1610(a) looks to "is how the *foreign state* uses the property, not how private parties may have used the property in the past." *Conn Bank of Commerce v Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) (emphasis in original); Pet. App. at 20a. Thus, they concede, the AFJPs' past investment practices are irrelevant. The supposition that ANSES affirmatively "elected" to maintain the investments in the United States according to those past practices finds not a shred of record support.

Even had this argument been preserved,[11] it "admittedly raises a question of first impression about the effects of the language of a particular foreign law," EM/NML Br. at 4, together with intertwined factual issues, none of which is appropriate for certiorari.

In all events, Petitioners' assertion finds not a scintilla of record support. The record shows that (1) the Pension Unification Law required the Funds to be repatriated to Argentina and absorbed into the Guarantee Fund by ANSES – a legislative mandate that incontestably was not implemented because of the Orders, Pet. App. at 10a, 20a; and (2) by statute, ANSES, which has no presence in the United States, was only authorized to invest in Argentine domestic securities, *id.* at 10a, meaning that as a matter of Argentine law, ANSES could never have "chosen," and in fact did not choose, to manage funds that remained in the United States. It was Petitioners themselves that obtained the restraints freezing the funds in the United States. This is not a "choice" that can be foisted on ANSES on the Petitioners' say-so.

11. Petitioners raised these new factual arguments for the first time in their motions for panel and *en banc* rehearing, making them inappropriate for consideration by this Court. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (consideration of issues was precluded where party raised it "for the first time in his response to petitioners' motion for rehearing in the Court of Appeals"); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (petitioner should not "assert new substantive arguments. . . when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it").

Petitioners thus bootstrap their own successful efforts to freeze the funds into a claim that ANSES "cho[se]," to be a passive investor during the pendency of the Orders, electing "not to actively trade" the Funds "and simply *hold* [them]." Pet. at 21. Not surprisingly, Petitioners offered neither below nor here a single affirmative act by ANSES demonstrating any such election. Neither ANSES nor the Republic had any "choice" in the matter: the Orders Petitioners themselves obtained froze the Funds in the United States. Had the Orders not been in place, the funds would have been repatriated by the AFJPs to Argentina in fulfillment of the Pension Unification Law likely even before its enactment, as Petitioners themselves understood when they rushed into the district court in October of 2008 to freeze the funds in the United States based merely on the announcement that the Pension Unification Law would be enacted in the future. This was a situation entirely of the Petitioners' (and the district court's) making, and was strenuously opposed at every turn by ANSES and the Republic. In no sense could either of them be said to be "choosing" this state of affairs.[12] The Second Circuit's conclusion that ANSES had been deprived of the "opportunity to use the funds for any commercial activity whatsoever," Pet. App. at 20a, was thus more than just factually correct; it was stating the obvious.

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12. Petitioners are therefore incorrect in saying that the Pension Unification Law "directed" that the Funds be put to the same use as the AFJPs had put them. Pet. at 21. On the contrary, the law explicitly barred ANSES from investing outside of Argentina and mandated that the funds be repatriated and be administered by ANSES "in Argentina." Pet. App. at 10a; *see supra* p. 10.

II. THE SECOND CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE LAW OF ANOTHER CIRCUIT OR ANY OTHER AUTHORITY

Having held that the only relevant "use" to which the Funds had been put was the enactment of the Pension Unification Law transferring "legal control" of the Funds (but, certainly as to those funds located in the United States and by then already frozen, not actual control of them), the Second Circuit went on correctly to conclude that "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for commercial activity'" for purposes of the FSIA's attachment regime in § 1610(a). *Id.* at 20a.

Petitioners do not claim that this holding under § 1610(a) is subject to any circuit split, nor does the holding conflict with this Court's decision in *Weltover*, a case that, as noted, did not even involve § 1610. In that case, this Court held that the Republic's sale of commercial bonds fell within the "commercial activity" exception to *jurisdiction* contained in § 1605(a)(2) of the FSIA, thus subjecting the Republic to private lawsuits in the courts of the United States by bondholders seeking to enforce those "garden-variety debt instruments." *See Weltover*, 504 U.S. at 607-08. In so holding, this Court noted that

> when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because

> the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U. S. C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Id. at 614 (citation omitted).

Nothing in the court of appeals' opinion is at odds with *Weltover*, or even involves the jurisdictional issue addressed in that holding. On the contrary, the court of appeals' holding that "the . . . transfer to a governmental entity of legal control over an asset" is a sovereign, non-commercial "use" for purposes of the execution standard in § 1610(a) – which is different and narrower than the jurisdictional standard in § 1605(a)(2) – is in total harmony with *Weltover* and the many other decisions that have correctly distinguished between the strict execution preconditions of § 1610 and the broader jurisdictional reach of § 1605.[13] Moreover, unlike the

13. *See Af-Cap v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087 (9th Cir. 2007) ("[T]he phrase 'used for' in § 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States."); *id.* at 1090 ("[I]f Congress had intended to equate 'used for' with 'integral to' or 'related to,' Congress likely would have used the phrase 'in connection with,' as it did in § 1605."); *Conn. Bank of Commerce*, 309 F.3d at 255.

examples of commercial activity provided by *Weltover* (*e.g.*, "a contract to buy army boots," *see Weltover*, 504 U.S. at 614-15), a legislative enactment transferring legal or administrative control over mandatory social security contributions to a governmental entity (such as ANSES) is the type of act *only a sovereign could perform.* Put simply, "such authoritative control" of mandatory social security contributions "cannot be exercised by a private party." *Id.* at 614.

Not only is this conclusion fully consonant with *Weltover*, it finds unanimous support in circuit case law,[14] as well as the structure and differing language of §§ 1605 and 1610, whose "expropriation exceptions" to jurisdiction and execution are distinct from the "commercial activities" exceptions, *see* §§ 1605(a)(3) and 1610(a)(3), thus reinforcing that the assertion of sovereign control or ownership over a particular asset is a sovereign, non-commercial activity for purposes of the FSIA.[15]

14. *See Rong v. Liaoning Province Gov't*, 452 F.3d 883, 889 (D.C. Cir. 2006) (Chinese province's statutory takeover of an automobile company was sovereign, rather than commercial); *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) ("Expropriation is a decidedly sovereign – rather than commercial – activity."); *Beg v. Islamic Republic of Pak.*, 353 F.3d 1323, 1326 (11th Cir. 2003) ("Confiscation of real property is a public act because private actors are not allowed to engage in 'takings' in the manner that governments are."); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983) (nationalization of property is a "quintessential [g]overnment act").

15. Petitioners' stubborn reliance upon cases concerning the FSIA's "expropriation exception" to *jurisdictional*

(Cont'd)

The Second Circuit's decision is not affected by the decisions cited by Petitioners – *not* involving the transfer of statutory control over an asset, and involving *jurisdiction rather than execution* – in which courts were willing to find that a sovereign had engaged in "commercial activity" with respect to that asset. The decisions cited by Petitioners, *see* Pet. at 18-19, merely serve to illustrate *Weltover*'s statement that "garden-variety" market activities are likely to fall within

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(Cont'd)

immunity is misplaced, as it has no bearing on the *execution* question here. This jurisdictional exception allows suit where (*inter alia*) nationalized property is "owned or operated" by foreign sovereign agencies or instrumentalities "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Those cases held that the "owned or operated" limb of this exception was satisfied regardless of whether the sovereign entity was affirmatively "using" or "benefiting" from the seized property. *See Nemariam v. Fed Democratic Republic of Eth.*, 491 F.3d 470, 480 (D.C. Cir. 2007) (holding that "[t]he phrase 'owned or operated' [contained within § 1605(a)(3)] plainly does not include a benefit requirement"); *Alperin v Vatican Bank*, No. C-99-04941 MMC, 2007 U.S. Dist. LEXIS 95529, at *28 n.8 (N.D. Cal. Dec. 27, 2007) (examining, in context of claims by plaintiffs that the wartime Croatian regime had transferred looted property to Vatican, whether Vatican Institute of Religious Work's alleged receipt of that property would satisfy § 1603(3)'s "takings" requirement, absent a showing that the Institute of Religious Work "benefited" from use of that property). By contrast, whatever the basis for *jurisdiction* under § 1605, § 1610(a) explicitly requires for purposes of *execution* a showing of commercial "use," which could not be made here.

§ 1605(a)(2)'s "commercial activity" exception to jurisdiction – an issue not raised by this case.[16]

Finally, Petitioners' speculation that a foreign state's continued holding of United States investment accounts might be tantamount to "use" of such accounts for a "commercial activity" for purposes of § 1610(a) is beside the point, because, as the Second Circuit correctly found, no such use occurred here. Accordingly, Petitioners have failed to identify any inconsistency with *Weltover*.

16. *See Globe Nuclear Servs & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 289 (4th Cir. 2004) (§ 1605(a)(2) satisfied because "[t]he entrance into a contract to supply a private party with uranium hexafluoride is the very type of action by which private parties engage in 'trade and traffic or commerce'"); *Rush-Presbyterian-St Luke's Med. Ctr v Hellenic Republic*, 877 F.2d 574, 580-81 (7th Cir. 1989) (Greek government's contract with two doctors and a U.S. organ bank providing for performance of kidney transplants for an agreed amount was "commercial activity"); *Tex Trading & Milling Corp v Fed. Republic of Nig* , 647 F.2d 300, 309 (2d Cir. 1981) (Nigerian government's purchase of cement was "commercial activity" because "the activity [was] one in which a private person could engage"); *Wasserstein Perella Emerging Mkts Fin., L.P v. Province of Formosa*, No. 97 Civ. 793 (BSJ), 2000 U.S. Dist. LEXIS 6416, at *27 (S.D.N.Y. May 9, 2000) ("The Province does not deny that borrowing money and hiring investment banks are inherently commercial activities.").

III. THE STATUTORILY-MANDATED REPATRIATION OF THE FUNDS TO ARGENTINA IS NOT A "COMMERCIAL ACTIVITY"

Petitioners artfully claim that for the Funds to be repatriated to Argentina in conformity with Article 8 of the Pension Unification Law, they would need to be "liquidate[d] and transfer[red] out of the investment accounts" in the United States, a process which supposedly would be a commercial "use" of the Funds for purposes of *Weltover*. Pet. at 22-23. This contrived proposition is unconnected to *Weltover* and, like their previous argument, bootstraps on Petitioners' own improvident effort to freeze the funds in the United States.

Weltover did not address whether the fulfillment of a foreign statute's mandate that social security funds in the United States be repatriated to a specialist foreign government agency should be characterized as commercial "use" of such funds for execution purposes under § 1610(a)(1), much less made such a holding.[17] By contrast, circuit court authority unanimously holds that repatriation of assets is a sovereign, non-commercial activity.

17. None of the other decisions Petitioners cite, Pet. at 23, involved repatriation of assets. *See Libancell S A L v Republic of Leb* , No. 06 Civ. 2765 (HB), 2006 U.S. Dist. LEXIS 29442, at *10-13 (S.D.N.Y. May 16, 2006) (noting in dicta that the "proceeds of a potential debt offering" might satisfy § 1610(a)'s "commercial use" exception, but holding that Lebanon had not waived immunity from execution over such assets); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 750 (S.D.N.Y. 2004) (addressing Azeri government's implementation of a "privatization" program regarding its state-owned oil company), *opinion clarified*, No. 02 Civ. 6356, 2005 WL 2585227 (S.D.N.Y. Oct. 13, 2005).

See Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Sys., Inc., 495 F.3d 1024, 1037 (9th Cir. 2007) (holding that a defense ministry's plan to "send the proceeds [of an arbitration award] back to Iran for assimilation into [its] general budget" was non-commercial for purposes of § 1610(a), "[b]ecause *repatriation into a ministry's budget does not constitute commercial activity*" (emphasis added)), *rev'd on other grounds*, 129 S. Ct. 1732 (2009);[18] *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 546 (9th Cir. 1996) ("a governmental agency of the Philippines is acting under a statutory mandate to recover property allegedly stolen from the treasury"; because this was an exercise of "police power," the commercial-activity exception does not apply"). In none of these cases did the mechanics of repatriation bear on the conclusion that the acts were non-commercial, nor should it bear on it here.

Indeed, the notion that a government, acting in fulfillment of a sovereign enactment, cannot transfer monies from one country to another without necessarily conducting "commercial" activities, would undermine this Court's direction, in *Weltover*, that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity," *Weltover*, 504 U.S. at 614, because the implementation of such regulations invariably involves

18. This Court's later reversal of the Ninth Circuit's decision related solely to the issue whether the funds were "blocked funds" for purposes of the Terrorism Risk Insurance Act of 2002, 28 U.S.C.A. § 1610 note; *see Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732, 1745 (2009), and therefore did not affect the Ninth Circuit's earlier holding that repatriation of funds was a sovereign, non-commercial activity for purposes of § 1610(a).

the transfer and repatriation of assets from overseas bank accounts into the home country.

Above all, Petitioners pay no heed to what *Weltover* defines as the "nature" of a sovereign activity, *i.e.*, "the outward form of the conduct that the foreign state performs or agrees to perform." *Id.* at 617. Here, the "outward form" of the proposed repatriation is that it is part of a national law placing all Argentine social security funds under one administrator, ANSES. Since the transfer of "legal control" under this law was correctly held to be a sovereign activity, incidental activities necessary for the fulfillment of that transfer (such as repatriation) are likewise sovereign in nature.

IV. THE COURT SHOULD DENY THE PETITION BECAUSE THERE EXIST MULTIPLE ALTERNATIVE GROUNDS FOR AFFIRMANCE

Where "there [are] other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the questions presented," a grant of certiorari is ill-advised. Eugene Gressman et al., *Supreme Court Practice* 504 (9th ed. 2007). The Court should therefore deny the Petition based upon the many alternative grounds for affirmance properly raised before, but found unnecessary to reach by the court of appeals.[19]

19. *See supra* p. 11 n.4, p. 13 n.5.

CONCLUSION

The petition for certiorari should be denied.

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In The Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, et al.,
Petitioners,

v.

THE REPUBLIC OF ARGENTINA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Respondent the Republic of Argentina (the "Republic") respectfully requests that this Court deny the petition for writ of certiorari filed by petitioner-plaintiffs Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP and Blue Angel Capital I LLC (the "Aurelius Plaintiffs" or "Aurelius") and joined by certain other plaintiffs, including plaintiffs EM Ltd. and NML Capital, Ltd. ("EM/NML").[1]

SUMMARY OF THE ARGUMENT

The petition in this case seeks review of a deliberately narrow, fact-specific and uncontroversial decision of the Court of Appeals for the Second Circuit that the Foreign Sovereign Immunities Act ("FSIA" or the "Act"), 28 U.S.C. §1610(a), does not permit a creditor of a foreign state to execute on social security funds held and administered in the United States by private parties for the benefit of the employees and pensioners who contribute them, solely because the state enacts legislation transferring administration of such funds to a state agency and requiring the funds to be repatriated to the foreign state. *See Aurelius*

[1] The Republic submits this brief in opposition to the Aurelius petition for writ of certiorari, dated December 21, 2009 ("Pet."), as well as in response to EM/NML's brief in support of the petition, dated January 11, 2010 ("EM/NML Br."). Although EM/NML are nominally respondents because "[a]ll parties other than the petitioner are considered respondents," Sup. Ct. R. 12.6, the EM/NML plaintiffs were identically situated to the Aurelius Plaintiffs below, and like them, are requesting that certiorari be granted.

Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 129-31 (2d Cir. 2009) (Wallace, J., joined by Walker, J.); App. 17a-20a.[2] Section 1610(a) provides that attachment or execution is permitted only on "property in the United States of a foreign state . . . used for a commercial activity in the United States." The Second Circuit properly held that plaintiffs could not attach or execute on Argentine social security funds that were undisputedly held and administered by private parties at the time the district court ordered them to be restrained in aid of execution, and that the subsequent enactment of an Argentine law transferring their administration to the state social security agency, which did not use them for any activity in the United States and was required by the legislation to repatriate them to Argentina, did not change this result.

The Second Circuit's decision was compelled by the language of the statute. Section 1609 of the FSIA provides that "the property of a foreign state in the United States shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611." Section 1610(a) in turn provides that only property of the foreign state "in the United States" and "used for a commercial activity in the United States" is subject to execution or attachment in aid of execution (if, in addition, one of the seven specific exceptions to immunity in Section 1610(a)(1)-(7), which includes a waiver of execution immunity by

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[2] The Honorable Sonia Sotomayor was a member of the court of appeals' panel before she was appointed to this Court on August 8, 2009. The two remaining members of the panel issued the opinion unanimously. *See* 28 U.S.C. § 46(d), 2d Cir. Local Rule 0.14(b).

the state, applies).[3] Property held by private persons when it is restrained or attached in aid of execution obviously does not satisfy the statutory test, nor does property transferred to the administration of a state agency that does not use it all, and is legally obliged to repatriate it outside of the United States (even leaving apart the presumed legal separateness of the agency from the state itself, an issue the court of appeals did not reach).

There is no circuit split on this issue, nor do petitioners claim one. *See, e.g.*, EM/NML Br. at 7. Rather, the petition asks the Court to decide two convoluted "questions presented," that are self-evidently unworthy of a writ of certiorari. Pet at i-iv. Petitioners' first question – concerning whether Argentine Law 26,425 transferred the social security funds to the Republic "in situ" in New York – is one that they did not preserve below. This new argument is also at direct odds with the argument that petitioners did raise below – that repatriation to Argentina was a commercial use in the United States – an argument the court of appeals expressly rejected.

Petitioners' second question, which deals with the propriety of the district court's original restraining orders, is one that the court of appeals explicitly held

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[3] Section 1610(b) provides for a different regime in respect to the attachment in aid of execution and execution of property in the United States of agencies or instrumentalities of the foreign state, and Section 1611(b) provides for heightened immunity for, *inter alia*, central bank and military property. These sections are inapplicable here, where the plaintiffs themselves claimed that the property sought to be attached and executed was the property of the Republic of Argentina, the state itself. *See* App. 17a-18a.

it need not reach. App. 22a. Even if the issues identified by the petition had any merit – which they do not – under this Court's well-established practices, the Court does not review issues that were not properly raised below, or that the court of appeals found unnecessary to address.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. The Republic's Economic Crisis And The Sovereign Debt Restructuring Process

Between 1998 and 2002, the Republic experienced the worst economic, social and institutional crisis of its modern history, marked by an enduring recession, record levels of unemployment and poverty and lack of access to the international capital markets. *See, e.g.*, Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). As a result of a series of negative external shocks (i.e., the Russian debt default of 1998, the Brazilian currency devaluation of 1999, a decline in the prices of Argentina's exports and rising international interest rates), the Argentine state was essentially bankrupt. With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period. Blustein, *supra*, at 1.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden – some $80 billion in public external debt alone

– while maintaining basic governmental services necessary for the health, welfare and safety of the Argentine population. *See, e.g.*, Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 Int'l Law. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children."). "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http //www.imf.org/external/np/sec/nb/2002/nb0280.htm. The "refus[al]to pay" external debt under these extreme circumstances was not a "recalcitrant" decision by the Republic not to meet its obligations, as petitioners charge. Pet 4. Just as the United States Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), neither were the terms of the Republic's agreements with its external debt holders. Like many nations over the course of history that have had to restructure their debt in times of economic crisis, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, ALEXANDER HAMILTON: A BIOGRAPHY 163-88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt

Of course there is no bankruptcy regime for insolvent states, so the Republic's external debt restructuring was necessarily on an entirely voluntary basis. The Republic did not "repudiate" that debt EM/NML Br. at 1. Instead, consistent with United States government policy favoring the orderly and consensual restructuring of sovereign debt, the Republic restructured its unsustainable debt in 2005 through a global exchange offer in which participating bondholders exchanged old, nonperforming bonds for new, performing bonds with lower interest rates, reduced principal, and/or longer maturities The exchange offer was extended to all beneficial owners of eligible bonds on the same terms and reflected the Republic's commitment to treat its private creditors equitably.[4] Approximately $62.5 billion in principal amount, or over 76% of the aggregate eligible debt, was tendered in the exchange offer, making it the largest sovereign debt restructuring in history.

B. Petitioners Chose Not To Participate In The Republic's Debt Restructuring

The Aurelius Plaintiffs, like other litigants against the Republic who did not enter the restructuring, are entities that are in the business of buying distressed sovereign debt in order to speculate in litigation

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[4] The Republic's announcement that it would not resume payments on non-tendered bonds was not "recalcitrance." Rather, it was a critical ingredient to the success of the exchange offer, as participating bondholders would not agree to incur substantial "haircuts" on their holdings if there were a possibility that the Republic would offer non-tendering bondholders a more generous arrangement, much less pay them in full

against the issuing states.[5] Aurelius acquired beneficial interests in Republic bonds at a deep discount well after the Republic suspended payments on its unsustainable external debt in December 2001, and even after the Republic's 2005 exchange offer and announcement that it would not resume payments on non-tendered bonds. Aurelius's business strategy seeks to take advantage of the fact that, as noted above, insolvent sovereigns, unlike private borrowers, cannot invoke the protection of a bankruptcy regime; the Republic has no recourse to an automatic stay of litigation or protection from enforcement procedures as a private debtor would, and interest on judgments against the Republic continues to run indefinitely

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[5] These entities are commonly known as "vulture funds." *See, e.g.*, Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 1, 27 (2008). EM/NML are also off-shore vulture funds who, consistent with their chosen business strategy to litigate against financially distressed states, acquired beneficial interests in Republic bonds at a deep discount immediately before and after the Republic suspended payments on its unsustainable external debt in December 2001. *See also CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F. Supp. 1105, 1107-08 (S.D.N.Y. 1995) (describing attempt to interfere with Brazil's debt restructuring by owner of EM), *see also Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328, 331-32, 355-56 (S.D.N.Y. 1998) (describing sovereign debt litigation by parent of NML, and holding that its acquisition of Peru's defaulted debt violated New York champerty law), *rev'd sub nom., Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999) (holding that creditor did not violate champerty law); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 635-36 (ABA Publ'ns Feb. 2001) (describing attachment by parent of plaintiff NML of payments to be made by Peru on restructured debt).

rather than stopping on the date of a bankruptcy filing.

Because the business strategy of Aurelius and other professional plaintiffs that have brought suit against the Republic depends upon aggressive litigation, they have not surprisingly engaged in a series of previous attachment and execution efforts against the Republic. As the Second Circuit noted, App. 5a, courts have rejected the vast majority of these efforts. *See, e.g.*, *Capital Ventures Int'l v. Republic of Argentina*, 280 F. App'x 14, 15 (2d Cir. 2008) (affirming denial of attachment of funds held at the Federal Reserve Bank of New York in which the Republic had no interest), *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 475-76 (2d Cir 2007) (upholding vacatur of attachment and restraint of Argentine central bank's funds), *cert denied*, 128 S. Ct. 109 (2007); *Colella v Republic of Argentina*, No. C 07-80084 (WHA), 2007 WL 1545204 (N D. Cal May 29, 2007) (vacating attachment of Argentina's presidential airplane); *NML Capital, Ltd. v Republic of Argentina*, No. 04-cv-0197-CKK (D D C. Aug 3, 2005) (quashing writs of attachment of the Republic's diplomatic and military property); *NML Capital Ltd. v. Republic of Argentina*, No 02 Civ. 3804 (TPG), 2005 WL 743086 (S.D.N.Y. Mar 31, 2005) (vacating restraining and attachment orders concerning bonds tendered by third parties in the Republic's 2005 exchange offer), *aff'd*, 131 F App'x 745 (2d Cir. 2005).

The Aurelius Plaintiffs repeatedly complain that they have been unable to collect the face value of their claims against the Republic, which they were able to purchase at a deep discount precisely because the debt had been nonperforming for years But no one

"relegated" or "forced" Aurelius to resort to the FSIA's judgment enforcement procedures, Pet. 1, 4; when Aurelius chose to buy defaulted sovereign debt, it knew full well the FSIA's limitations And when Congress crafted the FSIA, it decided to limit the scope of execution on a foreign state's property to a significantly greater extent than it limited the scope of jurisdiction over *in personam* suits against foreign states. *Compare* 28 U.S.C. § 1605 *with id.* §§ 1609-1611; *see Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002); *Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* H.R. Rep No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626. These execution limits under the FSIA exist precisely because Congress envisaged circumstances in which a foreign state does not, or in the case of Argentina, is unable to, pay outstanding judgments. Aurelius and other plaintiffs' lack of success has been due to the fact that their enforcement efforts have violated the limits of the FSIA

C. Proceedings Below

Plaintiffs turned their sights on the social security assets at issue when the Argentine Congress, responding to the global financial crisis in the fall of 2008, considered legislation to return Argentina's social security system from a regime in which a portion of social security resources were managed by private pension fund administrators, the *Administradoras Fondos de Jubilaciones y Pensiones* (the "AFJPs"), to a system administered in Argentina exclusively by the *Administración Nacional De Seguridad Social* ("ANSES" or the "Administration"). ANSES is the

Argentine social security administration, a decentralized autarchic governmental entity.

In October 2008, before this legislation was enacted – i.e., at a time when the social security funds were being administered by the indisputably private AFJPs – plaintiffs sought, and the district court issued, restraining notices, orders of attachment and writs of execution against property in New York administered by the private AFJPs, based on plaintiffs' claim that the proposed legislation, which required the funds to be repatriated for administration in Argentina, gave the Republic an attachable interest in the property Notwithstanding Aurelius's suggestion to the contrary, the district court immediately authorized plaintiffs to serve all of these orders on the Republic and the New York financial institutions that were purportedly holding the social security funds, and plaintiffs immediately effected such service. *Compare* Pet. 10 ("On March 4, 2009, the District Court . . . authoriz[ed] Petitioners and other creditors for *the first time* to proceed to levy by service of attachment orders and/or writs of execution on the garnishee financial institutions that maintained the restrained investment accounts.") (emphasis added), *with* App. 28a-29a, 63a (district court acknowledging that it signed orders on October 31, 2008 authorizing levy and service of orders of attachment); EM/NML Br. at 2 & n.1 (asserting that NML attached and levied the restrained funds prior to December 9, 2008).[6] The unquestioned *effect* of these

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[6] Aurelius also misstates the procedural history when it claims that the district court did not "attach" the social security funds prior to March 4, 2009 Pet 19a As the record makes clear, and other plaintiffs acknowledge, the district court entered orders of attachment against the social security funds in fifteen cases

orders, however characterized, was to "freeze" these privately-administered funds in the United States, where they remain to this date as a result of the district court's restraints. Neither the private AFJPs nor ANSES, which is entitled to its own claim of sovereign immunity under the FSIA (separate from the Republic) and never waived such immunity, were ever sued, joined, served or found subject to the personal jurisdiction of the district court.

On December 11, 2008, following the passage of the proposed Argentine legislation as Law 26,425, the district court issued its opinion confirming its orders, holding that the Argentine legislation requiring social security funds (wherever located) to be administered by ANSES in Argentina constituted a "commercial activity" by the Republic in the United States. App. 53a. In authorizing plaintiffs to execute upon the social security funds, the district court committed several errors that independently required reversal, including that:

> 1) At the time the initial orders were issued, the assets consisted entirely of social security assets managed by the indisputably private

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against the Republic between October and December 2008. *See* App 63a-66a (district court detailing the orders of attachment issued in pre-judgment cases), EM/NML Br at 2 & n 1. Aurelius's mischaracterization of the record is apparently an attempt to assert priority over other plaintiffs to the social security funds and (erroneously) claim that the court of appeals "inexplicably misunderstood" the procedural posture of the case. Pet 9, 19 n 8. The former issue is irrelevant to the petition and moot in light of the Second Circuit's decision, and the latter claim is meritless. *See* infra Point II

AFJPs for the benefit of Argentine workers and pensioners. October 29, 2008 Hr'g Tr. at 11:1-8 (the district court: "These are not assets of the Republic now. . . . They're assets of private pension funds."). Even plaintiffs recognized that this was fatal to the orders under the basic principle that creditors may restrain only property that belongs to the debtor. Nov 24, 2008 Hr'g Tr. at 7:14-15 ("[EM/NML COUNSEL]: [U]nless at the time the restraints were served they actually had property of Argentina, it's ineffective. It doesn't have continuing life. It never was effective.")

2) Even if the funds had become property of ANSES after Law 26,425 was passed – which they did not because under that Law and other longstanding Argentine law they are administered solely for the benefit of Argentine pensioners and workers – the assets were still not available to creditors of the Republic under this Court's decision in *First Nat'l City Bank v Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), which held that agencies and/or instrumentalities of a foreign state such as ANSES are presumptively separate from the state itself. *Id.* at 624-26. The district court acknowledged that, as a matter of Argentine law, ANSES was in fact a separate legal person as "a 'decentralized entity' . . . [that] has the power to manage its own administration and finance, independent of the National Treasury[,] . . . can enter into contracts, sue and be sued, and acquire assets in its own name" App. 33a-34a. It nevertheless held that ANSES was "part of" the

> Republic merely because it performed a "governmental function," App. 49a, a standard that *Bancec* explicitly declined to endorse, 462 U.S. at 634 n.27, and that conflicted with every other decision addressing agency and/or instrumentality status under the FSIA.
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> 3) Finally, even if ANSES were liable for the debts of the Republic – which it is not – the district court further erred because the property it had attached and on which it ordered execution was not "used for" a commercial activity in the United States by either the Republic or ANSES In fact, neither the Republic nor ANSES had "used" the property at all either before or after the district court's orders against the funds and its opinion confirming them The property was therefore immune from execution under FSIA Section 1610, which requires that executable property of a foreign state be "used for" a commercial activity in the United States by the foreign state. 28 U.S.C § 1610(a).

The Republic, ANSES and the AFJPs appealed the district court's orders to the Court of Appeals for the Second Circuit, which expedited the appeal due to the urgent sovereign measure at stake.

On October 15, 2009, the Second Circuit reversed and vacated the district court's December 11, 2008 decision and "all of the associated orders" for the third reason listed above, finding it unnecessary to reach the other two issues. App. 17a-22a On appeal, plaintiffs had asserted the same "repatriation" argument that they had advanced in the district court. *See, e.g.*, Br.

of Plaintiff-Appellant Aurelius, filed Mar. 18, 2009, at 26-27 (2d Cir.) (arguing that "[t]he District Court properly exercised [its] authority in light of the pending legislation to . . force [the assets'] repatriation to Argentina"); *id.* at 31 (asserting that the Republic had a property interest in the social security funds because Law 26,425 sought to "repatriate the custodial assets to Argentina"). The court of appeals explicitly rejected that argument, holding that the property was immune from execution under FSIA Section 1610 even after the Argentine Congress passed Law 26,425 requiring repatriation:

> The only activity that the Republic had engaged in with regard to the funds at the time that the district court confirmed the Orders was the adoption of a law transferring legal control of the funds from the private corporations to the Administration. As we read "used for a commercial activity," we hold that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity." A contrary conclusion would essentially nullify the Act's commercial activity requirement in cases involving attachment and execution of a foreign state's property.

App. 20a. This decision both applied a plain reading of the statute, and was in line with precedent from another circuit. *Ministry of Def & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys.*, 495 F.3d 1024, 1037 (9th Cir 2007) ("Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the judgment is not subject to attachment under

§ 1610(a)."), *reversed on other grounds by*, *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, ___ U.S. ___, 129 S. Ct. 1732 (2009).

The court of appeals also necessarily rejected the district court's conclusion that the possibility that the repatriated funds *might* be invested in government securities in Argentina constituted a commercial use of the funds by the Republic in the United States. As the Second Circuit correctly held, again applying the plain meaning of the statute, "Section 1610(a) does not say that the property in the United States of a foreign state that '*will be used*' or '*could potentially be used*' for a commercial activity in the United States is not immune from attachment or execution. More is required: the property in the United States of a foreign state must be used for a commercial activity in the United States." App. 18a (emphasis in original).[7]

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[7] The Second Circuit found it unnecessary to reach the question whether investment in government securities by a social security administration could ever constitute commercial use by the foreign state. App. 21a. This was an independent ground to reverse and vacate the district court's orders, as the orders were premised on the district court's conclusion that investment of social security funds in Republic-issued debt was somehow improper or abusive. App. 53a, even though the district court recognized that "the provision of social security is a *governmental* function" – i.e., non-commercial – and that "the payment of pensions is something that is required under the Argentine Constitution and under Argentine law, and this is *not* commercial activity." App. 51a-52a (emphases added). In fact, *all* social security systems invest in government debt as a matter of policy, including that of the United States, which is required to invest *entirely* in U.S. treasury instruments. *See* 42 U.S.C. § 401(d) ("investments may be made only in interest-bearing obligations of

Because this holding under the plain language of FSIA Section 1610 was sufficient ground to reverse and vacate the district court's December 11, 2008 opinion and "all of the associated orders," the court of appeals held that it need not address, among other issues, "the propriety of the district court's issuance of the restraining orders prior to the passage of the legislation transferring the funds, when the funds were still the property of the private corporations." App. 22a.[8] Certain of the plaintiffs below now petition this Court to review this question that the court of appeals did not reach, and an antecedent question whether Law 26,425 transferred the social security funds "in situ" to the Republic in New York, which petitioners did not raise below until their unsuccessful request for panel/en banc rehearing, and which contradicts the repatriation argument they previously advanced before the lower courts.

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the United States or in obligations guaranteed as to both principal and interest by the United States")

[8] The court of appeals also held it unnecessary to reach, *inter alia*, whether "the Administration is not a separate 'agency or instrumentality' . . . as we have determined that neither the Administration nor the Republic used the funds for a commercial activity in the United States." App. 21a. However, this does not mean that the district court's erroneous findings were left "undisturbed" by the Second Circuit. EM/NML Br. at 3. To the contrary, the court of appeals vacated all of the district court's orders, App. 22a, which voided them of *any* precedential or persuasive effect. *See, e.g., O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the [lower court] deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.")

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Of Appeals Correctly Applied The Plain Language Of FSIA Section 1610, And The "In Situ" Question Presented By Petitioners Was Not Preserved By Them Below

The plain language of the FSIA compelled the Second Circuit's decision below based on its fact-based determination that the funds targeted for execution by plaintiffs were under the management of the indisputably private AFJPs when the district court restrained and attached the funds, and that neither the Republic nor ANSES "used" the funds before or after the district court's orders. App. 20a. As the court of appeals explained, "[u]nder the plain language of 28 U.S.C. § 1610(a), the funds are immune from attachment" because "the funds *in the hands of the Republic* must have been 'used for a commercial activity'" and the factual record established that they had not been. App. 20a (emphasis in original).

The Second Circuit's holding that the "adoption of a law transferring legal control of the funds" and requiring their repatriation to Argentina did not constitute commercial use by the Republic in the United States, App. 20a, was in accord with Congress's plain language in the FSIA and every other court that has addressed the meaning of Section 1610's "used for commercial activity" exception to immunity from execution. *See* App. 18a ("[T]he property that is subject to attachment and execution must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the

writ of attachment or execution is issued . . . This clearly follows from the plain language of section 1610(a).") (emphasis in original) (citing, *inter alia*, *Conn. Bank of Commerce*, 309 F.3d at 247; *FG Hemisphere Assocs., LLC v. République du Congo*, 455 F.3d 575, 594 (5th Cir. 2006); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 481 n.19 (2d Cir. 2007)); *accord Cubic*, 495 F.3d at 1037 ("Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the . . . judgment is not subject to attachment under § 1610(a).").

Contrary to plaintiffs' claim, Pet. at iii & EM/NML Br. at 7, the court of appeals did not decide an issue of "first impression", but made a straightforward ruling in accord with well-settled precedents applying the FSIA's plain language. That plain language authorizes execution against property of a foreign state located in the United States only if the property is "*used for* a commercial activity in the United States" by the foreign state, even if the foreign sovereign has waived its immunity. 28 U.S.C. § 1610(a) (emphasis added).[9] Certiorari would be unwarranted even if the

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[9] Of course, if this *were* an issue of "first impression", which it is not, it would counsel *against* this Court's review, as the Court ordinarily reviews issues only after their development in the lower courts. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) (declining review because "a denial of certiorari on a novel issue will permit the [lower] courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court'") (citing *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting the denial of certiorari) (denying certiorari to review issue because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issues more wisely at a later date")).

court of appeals had erred in its application of the statutory rule, *see* Sup. Ct. R. 10, much less where, as here, it was plainly correct in its conclusions.

Petitioners do not and cannot claim that the Second Circuit improperly stated the applicable rule of law or created a circuit split when it held that the social security funds at issue are immune from execution under the FSIA because the property was not "used for" a commercial activity in the United States. Instead, plaintiffs principally invoke this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), a case that did not deal with the use of social security funds and, more important, addressed the "in connection with" commercial activity exception to *immunity from jurisdiction* under Section 1605, rather than the considerably narrower and distinct "used for" commercial activity exception to *immunity from execution* under Section 1610. *See, e.g.*, Pet at 18 (citing *Weltover* and other cases applying FSIA Section 1605). As the Second Circuit correctly held, the plain language of the FSIA forecloses any argument that Sections 1605 and 1610 can be conflated, as every lower court to have addressed the issue has recognized App. 17a-18a.

Indeed, post-*Weltover*, this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 348 (1993), that under FSIA Section 1605(a) "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed '*in connection with*' such activity." *Id.* at 358 (emphasis added). The same reasoning, which properly assumes that Congress chooses its words with care, and uses different words when it wants to mean different things, confirms that Congress likewise

understood the difference between "used for" a commercial activity under Section 1610, and "in connection with" such activity under Section 1605. *See, e.g., KP Permanent Make-Up, Inc v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely.").

Every court to address this issue has confirmed this result, and there is no reason for this Court to review the Second Circuit's application of the well-settled meaning of the FSIA. Contrary to EM/NML's claim, EM/NML Br. at 8-9, the application of the plain language of FSIA Section 1610(a) is *not* an issue that has been confined to disputes in New York courts – an assertion refuted by the Second Circuit's decision itself, which cites identical law from the Fifth Circuit in rejecting the district court's misapplication of the FSIA. App. 17a-20a (collecting cases); *see also Cubic*, 495 F.3d at 1036 ("'used for a commercial activity'" is not the same as "*in connection* with a commercial activity or *in relation* to a commercial activity") (citation omitted, emphasis in original); *Af-Cap, Inc. v Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1085, 1089 (9th Cir. 2007) (although courts may have jurisdiction over suits based upon an act performed in the United States "in connection with" a commercial activity, execution is limited to property "used for" a commercial activity, which is "more specific and narrower"); *Conn. Bank of Commerce*, 309 F.3d at 259 (observing that "the phrase 'used for' . . . [is] nowhere found in the jurisdictional commercial activity exception discussed in *Weltover*"); *Brewer v. Socialist People's Republic of Iraq*, 89 F.2d 97, 100 (8th Cir

1989) (under FSIA scheme "even the victorious plaintiff may only pursue particular property of a foreign state"); *Letelier*, 748 F.2d at 799 (FSIA contemplates the existence of "a right [to jurisdiction] without a remedy [of execution]").[10]

The conceded absence of any circuit split on the unambiguous meaning of the FSIA is not overcome by EM/NML's observation that the Court has granted certiorari in other cases where "the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (quoted by EM/NML Br. at 7). *Sabbatino* involved the pre-FSIA application of the common-law "act of state" doctrine, which trains on the extent to which United States courts should defer to a foreign state's legal enactments or actions within their own territories, remains uncodified and consequentially tends to raise questions about "the proper role of the Judicial Branch" in foreign relations matters otherwise

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[10] Although the plain meaning of "used for" a commercial activity under FSIA Section 1610(a) has been confirmed by several circuits in varying contexts, the precise circumstances here, involving the effect of Argentine legislation reforming Argentina's national social security system, is virtually certain to never recur. *Compare* EM/NML Br. at 7 (citing *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 755 (1973) (granting certiorari to review recurring issue whether the Federal Power Commission must consider the possible anticompetitive effect of a public utility's application under § 204 of the Federal Power Act, 16 U.S.C. § 824c, for authority to issue a security)); *with id.* at 4 (EM/NML asserting that "the petition admittedly raises a question of first impression about the effects of the language of a particular foreign law . . .").

committed by the Constitution to the Executive and Congress. No such concerns are raised by this case, which involves the straightforward application of a statute – 28 U S C § 1610(a) – that expressly limits the courts' execution jurisdiction under the FSIA only to property of a foreign state "in the United States" "used for a commercial activity in the United States."[11] In reversing the district court's failure to apply the plain language of the statute, the Second Circuit enforced "the proper role of the Judicial Branch" prescribed by Congress. The fact that it did so in an area involving, by definition, a foreign state, is hardly a basis for granting certiorari; if it were, the Court's docket would be overwhelmed by FSIA cases [12]

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[11] In *Verlinden BV v Centr Bank of Nigeria*, 461 U S. 480 (1981) (cited by EM/NML Br at 7), this Court recognized that the FSIA embodies Congress's "undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States" precisely because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" *Id.* at 493 Notwithstanding EM/NML's assertion, the Second Circuit did not create "policy" by holding that plaintiffs could not execute against property that the Republic did not "use for" a "commercial activity in the United States," EM/NML Br at 7; to the contrary, the court of appeals applied the plain language of the FSIA requiring that result 28 U S C § 1610(a)

[12] EM/NML's claim that Argentina allegedly has a "long history of default" does not advance their case for a grant of certiorari EM/NML Br at 4, 9 It is more than ironic that their only citation for the contrary suggestion is *EM*, 473 F 3d 463, where this Court *denied* certiorari and the court of appeals *rejected* another attempt by them to execute against property immune under the FSIA *Id*., *cert denied*, 128 S Ct 109. This recent decision not to review issues identical to those raised here – including plaintiffs' flawed argument that FSIA Sections 1605 and 1610 should be conflated

Because petitioners cannot seriously dispute that the Second Circuit applied settled law in its decision, they now advance here a novel legal theory that they did not preserve on appeal – *viz.*, Argentine Law 26,425 transferred the social security funds to ANSES "in situ" in *New York* – and that is directly at odds with their prior position before the lower courts that the Argentine legislation required the property to be repatriated to *Argentina*. *See* Br of Plaintiff-Appellant Aurelius, filed Mar. 18, 2009, at 4, 19, 25, 27, 31 (2d Cir.) (asserting that Law 26,425, requires pension fund assets to be "repatriated" and referring to "repatriation" to Argentina, but failing to assert that the funds were transferred "in situ" in New York). The first time that Aurelius raised its "in situ" theory was in its unsuccessful request for panel and/or en banc rehearing in the Second Circuit. It is well-established, and for good reason, that "[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below." *Willis v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in the denial of the petition for a writ of certiorari) (citation omitted) ("Following this practice here makes good sense because we do not

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under *Weltover* – further underscores that the questions are not worthy of certiorari. *See Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1321-22 (1994) (Rehnquist, C.J., in chambers) ("We recently denied a petition for certiorari raising this precise issue. Our recent denial demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue.") (citing, *inter alia*, *South Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1304 (1981) (Powell, J., in chambers) (denying stay application because it raised issues "almost identical to those presented three years ago, when the Court voted to deny certiorari")).

have the benefit of a decision analyzing [the issue] to the facts of petitioner's case."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (declining to address argument that was "made . . . for the first time in . . response to petitioners' motion for rehearing in the Court of Appeals"; the "failure to raise this issue in a timely manner precludes our consideration").

In any event, even if petitioners had preserved their "in situ" claim below – which they did not – the argument is fully disposed of by the Second Circuit's ruling under the plain language of FSIA Section 1610(a). Even under petitioners' "in situ" theory the only "activity" that the Republic had engaged in with regard to the funds at the time the district court confirmed the orders was the adoption of a law "transferring legal control of the funds from the private corporations to the Administration." App 20a.[13] As the Second Circuit held under the plain language of Section 1610(a), "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used

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[13] Aside from all other flaws in this argument, it is particularly unworthy of certiorari review on the facts here. The presence of these social security funds in the United States when the relevant Argentine law was enacted in December 2008 was engineered by plaintiffs themselves in persuading the district court in October 2008 (when the social security funds were under the management of the indisputably private AFJPs) to erroneously restrain their transfer. No "activity" or "use" in the United States can be ascribed to any sovereign entity where, as here, plaintiffs themselves caused the funds to be "in situ" when the Argentine law was enacted, nor is this narrow and unique factual setting a suitable one to address this peculiar argument.

for a commercial activity.'" *Id.*[14] This conclusion should hardly be controversial: the exercise of sovereign power to transfer "control" of an asset, which is omnipresent in any state through the condemnation power, for instance, hardly implies that the property will be (or is) "used" for a commercial activity upon the exercise of such power As the Second Circuit correctly noted, such a conclusion "would essentially nullify the Act's commercial activity requirement in cases involving attachment and execution of a foreign state's property." App. 20a Petitioners point to no contrary authority in support of their new "in situ" theory, and there is none.

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[14] The dispositive holding by the court of appeals was therefore that there was no "use" of the funds by the Republic or ANSES. App. 20a ("neither the Administration nor the Republic had the opportunity to use the funds for any commercial activity whatsoever") Plaintiffs' fixation on whether investment for the benefit of social security beneficiaries would qualify as a commercial activity – which the court of appeals explicitly found it unnecessary to reach, App 21a – is therefore beside the point In any event, as the Republic and ANSES demonstrated below, provision of a social security system and investment of the social security funds entrusted to it does not make the property or its use commercial, because *only* social security administrators may make this investment Here, Law 26,425 specifically confirmed existing Argentine law that the social security funds "shall only be used to pay the benefits of the Argentine Integrated Benefit System," Law 26,425, art 8, and the maintenance of a national social security system is a quintessential non-commercial activity. *See* App. 49a (the district court "the provision of social security is a *governmental* function") (emphasis added)

II. The "Procedural" Question Identified By Aurelius Is Also Not Properly Before The Court And Is Likewise Meritless

Petitioners' second question presented – based on its assertion that the Second Circuit "inexplicably misunderstood" the "narrow" nature of the initial restraining orders entered by the district court prior to its decision confirming that the property was executable on December 11, 2008 – is likewise unworthy of certiorari. Pet. ii. In fact, this "procedural" issue, Pet. 24, is fully disposed of by the Second Circuit's explicit holding that it need not reach the impropriety of the pre-December 11, 2008 orders when it vacated the writs of execution in aid of which the earlier orders had been issued. App. 22a ("because we hold that the retirement and pension funds are not property subject to attachment and execution under the Act, we need not address the propriety of the district court's issuance of the restraining orders prior to the passage of the legislation"). This Court does not review issues that a court of appeals found unnecessary to reach. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1819 (2009) (this Court declining to address constitutional issues that were not "definitively" ruled on by court of appeals because "[t]his Court . . . is one of final review, 'not of first view'") (citation omitted); *F. Hoffman-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (court of appeals did not address alternative theory of liability presented by the respondents, and therefore

this Court declined to address the argument in the first instance).[15]

Nor is there any merit to plaintiffs' procedural claim in any case: even prior to the passage of Law 26,425, the district court had entered not only restraining orders but also attachments in aid of execution and writs of execution, which are hardly a "narrow" form of relief. *See* App. 27a-31a. Although Sections 1609 and 1610 of the FSIA speak of immunity from "attachment," "arrest," and "execution," this language equally embraces immunity from restraints and *any* other form of judgment enforcement process. *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1993) (dissolving injunction restraining "negotiation or use" of property where there was no basis to attach the property under the FSIA); H.R. Rep. No. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("The term 'attachment in aid of execution' [in Section 1610(a)] is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment.") Aurelius therefore engages in wordplay when it tries to ascribe significance to the fact that the district court supposedly did not "attach" or authorize "levy" upon the social security funds until March 4, 2009.[16]

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[15] Plaintiffs EM/NML apparently recognize the impropriety of Aurelius's second "Question Presented" and decline to adopt that question in their brief in support of certiorari. EM/NML Br. at i.

[16] In any event, as noted above, Aurelius is flat wrong that the funds were not attached or levied upon prior to March 4, 2009.

The critical point is that FSIA Section 1610(a) requires that property of a foreign state be "used for" commercial activity in the United States by the foreign state before the property is subject to *any* judgment enforcement process. As the Second Circuit held, this is not a procedural "catch-22" as plaintiffs claim, Pet. iv, but is a result of the FSIA's plain language in Section 1610, which embodies Congress' recognition that "execution against a foreign state's property [is] a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn Bank of Commerce*, 309 F 3d at 255 (cited by App. 18a: "'property in the United States of a foreign state' *and* must, have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued") (emphasis in original)); *see also* App 19a (citing *FG Hemisphere,* 455 F.3d at 594 (holding that "*[p]rior to* issuing a garnishment order, a district court must make factual findings that support application of the § 1610(a) exception to executional immunity") (emphasis added)) [17]

The district court explicitly acknowledged that it authorized plaintiffs to do so when it entered the initial orders in October 2008 *See* App 63a-66a, EM/NML Br at 2 & n.1.

[17] Aurelius similarly cites no authority for its assertion that a federal court's residual equitable power under the All Writs Act can override these limitations imposed by Congress in the FSIA – surely an unworthy basis to seek certiorari review Pet 24 In fact, "where a statute specifically addresses the particular issue at hand, it is that authority . that is controlling Here, Federal Rule of Civil Procedure Rule 65(d) and the FSIA specifically address the issue at hand and thus are controlling " *In re Estate of Ferdinand Marcos Human Rights Litig* , 94 F 3d 539, 545 n 9 (9th Cir 1996) (vacating injunction against foreign state's property "the All Writs Act is a residual source of

Contrary to petitioners' suggestion, the Second Circuit did not hold that the funds were immune *because* of the district court's restraints; rather, as noted, the court of appeals found that the funds were plainly not "used for" a commercial activity under FSIA Section 1610 either before or after the district court improperly restrained the property because the "mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity.'" App. 20a. As demonstrated above, this holding was clearly correct, and even if the questions presented by the petition were properly before this Court – which they are not – the Court should decline review because the well-settled principles applied by the court of appeals are not worthy of certiorari.[18]

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authority to issue writs *that are not otherwise covered by statute*") (citation omitted) (emphasis added)

[18] As noted, there were other independent reasons that also required reversal and vacatur of the district court's orders, which the court of appeals found unnecessary to reach including, *inter alia*, that the Administration is a separate agency or instrumentality whose property (let alone property it administers on behalf of others) is unavailable to satisfy claims against the Republic, and that the administration of funds solely for the benefit of Argentine pensioners and workers is not a "commercial activity" even if such use is by the state itself, which here it is not. *See* App. 21a-22a. That there are several other legal grounds that defeat plaintiffs' claims makes it even less necessary or appropriate for this Court to review the court of appeals' decision. *See* Eugene Gressman *et al.*, *Supreme Court Practice* 504 (9th ed. 2007).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, ET AL.,
Petitioners,

v.

THE REPUBLIC OF ARGENTINA,
ARAUCA BIT AFJP S.A., ET AL.,
ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS NML CAPITAL, LTD. AND EM LTD. IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Respondents NML Capital, Ltd. and EM Ltd. support and incorporate the first question presented in the petition for a writ of certiorari filed by Petitioners.

PARTIES TO THE PROCEEDING

Respondents NML Capital, Ltd. and EM Ltd. adopt the statement of the parties to the proceeding in the petition.

Pursuant to this Court's Rule 29.6, undersigned counsel state that neither NML Capital, Ltd. nor EM Ltd. is publicly traded, that neither has a corporate parent, and that no publicly held corporation owns 10% or more of the stock of either.

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BRIEF IN SUPPORT OF THE PETITION

Respondents NML Capital, Ltd. ("NML") and EM Ltd. ("EM") respectfully submit this brief in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. NML and EM adopt the petition's statements of the Opinion Below, Jurisdiction, and Relevant Statutory Provisions. NML and EM further adopt the petition's Statement of the Case, except as clarified below. If the Court grants the petition, NML and EM will argue that the Second Circuit's judgment should be reversed. If the Court subsequently grants the relief requested by Petitioners, the Court should also reverse the Second Circuit's decision with respect to NML and EM.

STATEMENT OF THE CASE

This case arises from the largest sovereign debt default in history. Its resolution will determine whether legislation that Argentina implemented in December 2008 enabled it to expropriate "in kind" assets that were being used for a commercial activity in the United States and, whether that legislation, nonetheless, insulates those assets from attachment and execution by Argentina's U.S. judgment creditors.

NML and EM are creditors of Argentina as holders of bonds issued by Argentina in the United States and repudiated as obligations of Argentina in December 2001. NML and EM have pursued their remedies in the courts of this Nation, as the bond documents issued by Argentina contemplated. Since that time, Argentina has refused to honor the judgments entered against it. Petitioners are other owners of defaulted Argentine bonds.

At issue in this appeal are pre-judgment attachment orders and other forms of process in aid of judgment-enforcement obtained by numerous bondholders, including NML, EM, and Petitioners—all of which were directed to slightly over $200 million in funds in the United States. The *Administración Nacional de Seguridad Social* (the "Administration"), a political subdivision of the Republic of Argentina, acquired legal title to the funds on December 9, 2008, when Argentina nationalized pension funds that had been held by private corporations in the United States, and that had been used by those private corporations solely for the commercial activity of investment.

Petitioners served restraining orders before the Administration took title to the funds, but they did not levy on the funds by service of attachment orders or writs of execution until March 4, 2009 (Pet. 10). By contrast, NML served a restraining order *and* an attachment order before Argentina nationalized the funds.[1] These actions were necessary to prevent Argentina from transferring the funds out of the country and beyond the reach of aggrieved bondholders. Argentina had already removed billions of dollars worth of other assets from the United States in anticipation of and following its default on tens of billions of dollars of external debt.

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[1] Delivery of an attachment order to the Marshal results in a levy on the property described in that order. Petitioners' assertion that NML neither obtained an attachment order nor levied on the subject property (Pet. 11, 19 n.8) is incorrect. *See* Pet. App. 8a (observing that NML obtained "attachments"). EM obtained no attachment orders, despite the petition's suggestion to the contrary (Pet. 11).

The district court correctly held that the funds were not subject to immunity from attachment or execution under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–11. A court may attach or execute on a foreign state's property if the foreign state has "waived its immunity" and the property is "used for a commercial activity in the United States." *Id.* § 1610(a) (post-judgment); *id.* § 1610(d) (pre-judgment). There is no dispute that Argentina waived its immunity in the contractual documents governing the bonds in an effort to make the bonds more attractive to investors. The district court found that Argentina's Administration is a subdivision of Argentina for purposes of the FSIA (a determination left undisturbed by the decision of the court of appeals). At the time Argentina took title to the disputed funds through its Administration, those funds were used in the United States for the commercial activity of investing—and for no other activity.

The Second Circuit reversed. The panel reasoned that Argentina (and its Administration) did not have "the opportunity to use the funds for any commercial activity" before the attachment and restraining orders became effective. Pet. App. 20a. Argentina's nationalization law, however, shows the contrary. By the express terms of the law, Argentina took title to the nationalized assets "as a matter of law, in the same kind as that in which they are invested." Pet. App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008); *see also* Pet. App. 89a (Law 26,425, Art. 7, Dec. 9, 2008) (providing that the assets are to be "transferred in kind" to the Administration). Thus, when Argentina expropriated the assets, their commercial character did not change; they remained in the same U.S. investment accounts and were

committed to the same commercial use—investment for profit—as they had been previously. The only change was that Argentina itself (through its Administration) assumed the use of the assets for the commercial activity of investment in the United States.

On December 21, 2009, Petitioners sought this Court's review of the Second Circuit's decision. NML and EM support the petition. As Petitioners correctly explain (Pet. 16–24), when a foreign state expropriates property "in kind," and that property is being used for a commercial activity in the United States, the foreign state itself uses that property for a commercial activity in the United States at the time of expropriation. Although the petition admittedly raises a question of first impression about the effects of the language of a particular foreign law, the petition should nonetheless be granted because of Argentina's long history of default and the importance of the case nationally and internationally.

REASONS FOR GRANTING THE PETITION

1. NML and EM agree with Petitioners that a foreign state's ownership of investment accounts in the United States constitutes "use" of the property for a "commercial activity in the United States." This Court's holding in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), permits of no other conclusion. "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it," the foreign state's actions are "commercial" within the meaning of the FSIA. *Id.* at 614. If the foreign government's activities are "the *type* of actions by which a private party engages in 'trade and traffic or commerce'"—"whatever the motive behind them"—those activities are regarded as

commercial under the FSIA. *Id.* (quoting Black's Law Dictionary 270 (6th ed. 1990)).

The disputed property was used for a commercial activity in the United States under the rule of *Weltover*. So long as it has been located in the United States, that property has been "used for" one and only one activity—investing for profit. The roughly $200 million at issue here were brought from Argentina to the United States to take advantage of the enhanced market security and investment opportunities this country has to offer and have been held in investment accounts and used to trade in Treasury securities, stocks, bonds, American Depositary Receipts, and other investment vehicles with results not achievable in Argentina. Investing for profit is a paradigmatic commercial activity. The Congress that enacted the FSIA explained, "if an activity is customarily carried on for profit, its commercial nature could readily be assumed," and provided specifically that "a foreign government's . . . *investment in a security* of an American corporation" is a "commercial activity." H.R. Rep. No. 94-1487, at 16 (1976) (emphasis added); *see also* S. Rep. No. 94-1310, at 15–16 (1976) (same). The fact that these funds were used to seek profits in *exactly* the same manner as they would be used by a private investor—the quintessential "private player within [a market]"—leaves no doubt that these funds were used for a commercial activity. *See Weltover*, 504 U.S. at 614.

2. As Petitioners correctly explain, Argentina took title to the disputed property "as a matter of law, in the same kind as that in which they are invested." Pet. App. 90a. Thus, the nationalization law was designed to ensure that, at the time of transfer, Argentina would expropriate the property in the

same form in which it was previously held by the private companies. The use of the property did not change: the property was used for the commercial activity of investment in the United States before and *after* Argentina acquired it.[2]

As Petitioners note (Pet. 7, 15), Argentina could have designed the nationalization law to ensure that the assets would cease to be used for a commercial activity when Argentina acquired them. But in this case, it did not. The applicable nationalization law provided for Argentina to take title to property that was (and remains) in use for a commercial activity "in kind" without altering its commercial character. Pet. App. 89a. As a result, Argentina used and is using the nationalized property—just as a "private player" within the market—by continuing to invest it in New York investment accounts. *See Weltover*, 504

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[2] Argentina argued below that the process served or delivered before the nationalization law took effect is invalid because it was served and delivered when private third-parties who are not subject to any judgments relevant to this matter owned the disputed property. Any controversy over the validity of such pre-nationalization process, however, should not deter the Court from resolving this case. That is because NML also served attachment orders and a restraining order *after* the nationalization law took effect, and EM similarly served a post-nationalization restraining order. Moreover, NML and EM delivered writs of execution after the nationalization law took effect. Therefore, Argentina held title to the disputed property (and continued to invest that property) at the time of the service and delivery of at least some orders and writs that could be affected by the Second Circuit's reasoning, even though they are not subject to its judgment because the Second Circuit's decision addressed only process served and delivered before the nationalization took effect.

U.S. at 614. As such, the property is subject to attachment and execution by the bondholders Argentina bilked.

3. Although this case raises a question of first impression about the effects of the language of a particular foreign law (Pet. iii), it is nonetheless deserving of review. This Court has reviewed decisions that "raised issues of potential and recurring importance," even in the absence of a circuit conflict. *See Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 755 (1973). Review is especially warranted in cases that "raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v...Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Indeed, the Court has previously granted certiorari in a case specifically "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964).

This is such a case. The Second Circuit's opinion holds that foreign states that waive their immunity to raise capital in the United States can expropriate assets used for a commercial activity in the United States and insulate those assets from attachment or execution by investors they aggrieved here. That holding profoundly affects the relationship between investors in the United States and foreign governments, as well as the role of the U.S. judicial system in refereeing that relationship.

The importance of rejecting the policy established by the Second Circuit's opinion, as required by the FSIA in this context, has never been greater than it is now. The issuance of sovereign debt in the

United States is on the rise. "Despite a staggering 50 percent rise in world sovereign debt in the past two years," forecasters believe there will be a "further increase of 50 percent within four years . . . ." John Browne, *Close to the Edge*, Pittsburgh Trib. Rev., Dec. 6, 2009. At the same time, concerns about the risk of sovereign debt are mounting. *See* Michael Casey, *Sovereign Debt Is the Next Big Worry*, Wall St. J., Dec. 9, 2009. A former chief economist with the International Monetary Fund predicts that "more sovereign debt defaults will be likely over the next several years . . . ." *Sovereign Debt Defaults Likely Over Next Several Years*, Int'l Bus. Times, Dec. 13, 2009. And as a result of the global financial crisis, nationalization schemes, such as Argentina's, have also "greatly increased." Tom McNamara, *Foreign Sovereign Immunity During the New Nationalisation Wave*, 11 Bus. L. Int'l 5, 31 (2010). These trends, taken together, suggest that FSIA litigation is bound to "greatly increase[]" as well. *See id.*

Review is also warranted at this time because it is unlikely that relevant law will develop in other circuits. Because of the predominance of New York as "the nation's (and the world's) largest financial center" for investment, investment accounts that will be seized by foreign governments in the future are likely to be located only in the Second Circuit. *See Gen. Elec. Capital Corp. v. Cent. Bank*, 49 F.3d 280, 285 (7th Cir. 1995); *Banco Nacional de México v. Société Générale*, 820 N.Y.S.2d 588, 592 (N.Y. App. Div. 2006) (observing that the State of New York is "a clearinghouse of international transactions"). If left uncorrected, the Second Circuit's opinion will continue to govern the Nation's most crucial financial center, exposing massive amounts of assets in the United States to seizure by foreign governments,

while releasing those governments from accountability for their debt obligations here.

The attachability of nationalized assets is of paramount importance with respect to Argentina in particular. Argentina has a long and infamous history, going back two centuries, of defaulting on its sovereign debt. *See generally EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). As the Second Circuit explained, "Argentina has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what we might term a diplomacy of default." *Id.* Argentina's default in 1890 caused financial panic in England, and its threat to default again in 1956 was largely responsible for the creation of the so-called Paris Club. *Id.* Over the last three decades, Argentina has been a particularly recalcitrant debtor. In 1982, it suspended its foreign-debt payments and forced bondholders to accept reduced payments, becoming, as one commentator observed, "the single most resistant debtor in international finance." *Id.* (citing Ernest J. Oliveri, Latin American Debt and the Politics of International Finance 164 (1992)). In light of this history, there can be no doubt that this case presents a matter of vital national and international importance.

CONCLUSION

If the Court grants review, NML and EM will argue that the judgment of the Second Circuit should be reversed. If the Court subsequently grants the relief requested by Petitioners, it should also reverse the Second Circuit's decision with respect to NML and EM.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, *et al.*,

Petitioners,

—v.—

THE REPUBLIC OF ARGENTINA,

ARAUCA BIT AFJP S.A., *et al.*,

ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC (collectively the "Aurelius Parties" or "Petitioners"), joined by numerous Individual Bond Holders, respectfully submit this Reply pursuant to Rule 15.6 of this Court's Rules, to address procedural arguments newly advanced by Respondents The Republic of Argentina (the "Republic") and Administración Nacional de Seguridad Social ("ANSES") in their respective briefs in opposition to the Petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respondents contend that the question presented by Petitioners was not preserved below or passed upon by the Second Circuit Court of Appeals. *See* Brief in Opposition of The Republic of Argentina ("Republic Opp'n Br.") at 3-4, 23-24, 26-27; Brief in Opposition for Respondent ANSES ("ANSES Opp'n Br.") at 25 & n.11. Specifically, the Republic and ANSES submit that the Aurelius Parties never previously argued that the pension assets were nationalized *in situ* and "in kind" and claim that this position "is directly at odds" with the Aurelius Parties' observation in the Court of Appeals that the Republic planned to repatriate the nationalized assets after assuming legal ownership of them. Republic Opp'n Br. at 23 (purporting to quote from the Aurelius Parties' Second Circuit brief, without providing a copy of it); ANSES Opp'n Br. at 25. Respondents are incorrect.

The Aurelius Parties squarely and repeatedly presented in their briefing to the Second Circuit Court of Appeals that the nationalization legislation, by its

terms (and as has never been in dispute), "provide[d] for financial institutions, securities depositories, mutual fund companies and any other third-party custodian where the private pension assets are held to establish ANSES as the 'sole and exclusive holder of those assets and rights' ";[1] that the " 'resources comprising the individual capitalization accounts"—*i.e.*, the nationalized private pension assets, including those invested through commercial accounts in New York—were therefore "expressly 'transferred in kind' to ANSES to 'become part of' ANSES's existing Guarantee Fund";[2] and, accordingly, that such assets met both the New York law definition of an attachable property interest of the Republic[3] and the FSIA definition of property "used for a commercial activity in the United States."[4]

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[1] Brief of Plaintiffs-Appellees Aurelius Capital Partners, LP, *et al* to the Second Circuit Court of Appeals, dated March 18, 2009 ("Aurelius 2d Cir Br "), at 18; *id* at 1 (Counterstatement of Issues (2)) ("Did the District Court correctly conclude that cash, stocks, bonds and other liquid securities held in custodial or other investment accounts in the United States are property of the Republic as a result of legislation transferring and assigning exclusive title and plenary control of those assets from private pension funds to the Executive Branch of the Argentine Government?"); App 90a

[2] Aurelius 2d Cir Br at 35-36; 90a (specifying that the transfer occurred "as a matter of law, in the same kind as that in which they [the nationalized pension assets] are invested [already])"

[3] Aurelius 2d Cir Br at 35-39

[4] *Id* at 48-56, *id* at 1 (Counterstatement of Issues (4)) ("Did the District Court correctly conclude that assets held in custodial or other investment accounts in the United States and used for investments in market-traded securities, including stocks and bonds, are 'used for a commercial activity in the United States' within the meaning of the Foreign Sovereign Immunities Act?")

Moreover, the Second Circuit's decision squarely passed upon the issue presented by explicitly acknowledging that the nationalization legislation "mandat[ed] that the majority of the funds previously administered by the private corporations be transferred ***in kind*** to the Guarantee Fund administered by [ANSES]", but nevertheless holding as a matter of law under the FSIA that the Republic did not "use" the assets for a commercial activity as a result of the transfer of their legal ownership "in kind" to ANSES. App. 9a-10a (emphasis added), 20a; *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice "permit[s] review of an issue not pressed so long as it has been passed upon . . . .") (citations omitted); *U.S. v. Williams*, 504 U.S. 36, 42-43 (1992) ("Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari . . . .").

Nor have Petitioners been inconsistent about their view of the case. The fact that the Republic may intend to zero out and close the transferred investment accounts and repatriate the pension assets following their nationalization "in kind" is not "directly at odds" with Petitioners' argument that the Republic necessarily "uses" the pension assets for a commercial activity in the United States by nationalizing them "in kind" as already invested *before* repatriating them—which repatriation itself would require commercial use of the accounts in order to accomplish. *See* Pet. for Writ of Certiorari at 22-23 (observ-

ing that the Republic would have to liquidate the existing investments it chose to acquire *in situ* and in kind before doing anything different with those assets).

Petitioners' "second" issue presented in their Petition—the procedural "catch-22" that the Court of Appeals' decision creates for judgment creditors of foreign states who are left unable to restrain assets they locate in the United States long enough for a federal court to address whether the assets are immune from attachment/execution under the FSIA —is also squarely presented by the Petition. While Respondents characterize this issue as being "second" to and separate from the first, Petitioners presented the issue as part and parcel of the first. Petitioners are not, as the Republic suggests, seeking review of the validity of the restraining orders that were entered, a separate issue that the Court of Appeals purported not to reach (but necessarily did reach by holding that those orders prevented the Republic from "using" the pension assets for a commercial activity, which the orders could not have done unless they were valid and effective when entered). Rather, the issue presented in the Petition is whether the Court of Appeals effectively eviscerated Section 1610(a)'s exception to sovereign immunity by holding that an order designed only to prevent removal of property of a foreign state from the United States long enough to determine if that property falls within the exception to sovereign immunity, itself renders the property immune from attachment and execution (but without which restraint the property could be removed from the United States rendering it immune and leaving creditors without the remedy Congress intended them to have under the FSIA). The Court of Appeals' deci-

sion on the merits squarely presents that predicament, warranting review by this Court for all of the reasons Petitioners have expressed.

CONCLUSION

For the reasons set forth in the Petition and above, the Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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